

**Before the  
Federal Communications Commission  
Washington, D.C. 20554**

In the Matter of	)	
	)	
Amendment of the Commission's Part 90	)	
Rules in the 904-909.75 and 919.75-928 MHz	)	WT Docket No. 06-49
Bands	)	

**Comments**

Warren Havens, Telesaurus VPC LLC, AMTS Consortium LLC and Intelligent Transportation & Monitoring LLC, (respectively “Havens”, “TVL”, “ACL” and “ITL”, together the Telesaurus “Affiliates”) hereby submit their comments on the Commission’s Notice of Proposed Rulemaking (“NPRM”).<sup>1</sup> Havens is the controlling-interest holder in Telesaurus Holdings GB LLC (“Telesaurus”). Telesaurus holds the majority of the Location & Monitoring Service Multilateration (“LMS-M”) A-block licenses in the nation.<sup>2</sup> Telesaurus and Affiliates are briefly described in Attachment 1 and footnote 1 hereto.

Although the NPRM dismissed the rulemaking, RM-10403, that was initiated by the FCC upon the request of Progeny LMS, LLC, it ultimately adopted most of Progeny’s position and arguments in RM-10403. However, the NPRM did not address or incorporate Havens’ or Telesaurus’ position in RM-10403. For this reason, and, since the Affiliates and Telesaurus have

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<sup>1</sup> *Notice of Proposed Rulemaking*, FCC 06-24, WT Docket 06-49, released March 7, 2006.

<sup>2</sup> See Exhibit 1 hereto for a summary of Telesaurus and its affiliates. These Telesaurus LMS-M licenses are for markets with approximately 80% of the nation. These licenses were previously held by Warren C. Havens (“Havens”). Mr. Havens assigned these licenses to Telesaurus earlier this year. Mr. Havens is the majority interest holder in and President of Telesaurus. Telesaurus has affiliates that are also majority owned and managed by Mr. Havens: TVL, ACL and ITL. Mr. Havens formed and developed TVL, ACL, and ITL in large part to support nationwide development of wide-area Intelligent Transportation System (“ITS”) wireless based upon the Telesaurus LMS-M licenses. LMS, with DSRC are the two FCC-designated unique and much needed ITS radio services (47 CFR 90.350).

plans to jointly develop and operate the LMS, MAS and 217-222MHz licenses they hold for advanced wireless services, including for ITS purposes (these plans have been described for years in dozens of pleadings in numerous Commission proceedings),<sup>3</sup> the Affiliates are hereby submitting for consideration in the instant proceeding filings made by Havens and Telesaurus in RM-10403. For reasons given by Telesaurus in its comments, the NPRM itself is causing significant damages to Telesaurus' and Affiliates' coordinated technical and business plans, and if the ideas in the NPRM with regard to decreases in power and time of use are adopted this would cause further damages.

The Affiliates agree with, reference, and incorporate herein the Comments of Telesaurus submitted in this matter. In addition, the exhibits hereto are provided for the joint purposes of the Affiliates' and Telesaurus' Comments.

The Affiliates hereby reference and incorporate all of the pleadings by Havens and Telesaurus in RM-10403, but point to the concluding position of Havens and Telesaurus opposing any Notice of Proposed Rulemaking of the nature suggested by Progeny or any condition prior to a specific presentation by licensees as to a demonstrable need for changes. In Exhibit 3 hereto, Affiliates attach some of the later filings by Havens and Telesaurus in RM-10403 that illustrate this position and related matters. Affiliates also provide as Exhibit 2 the FCC's Memorandum Opinion and Order<sup>4</sup> that granted an extension of time to meet the 5-year milestone for Havens' LMS (now Telesaurus'). This Memorandum Opinion and Order shows that the Bureau reviewed and accepted Havens' (now Telesaurus') due diligence and plans to develop technology, equipment, systems and applications to provide service under the current

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<sup>3</sup> For example, RM-10403, various AMTS, 220-222 MHz, VPC and MAS rulemaking and restricted proceedings, as well as proceedings on 5.9 GHz DSRC (the "sister" ITS radio service to LMS-M), 4.9 GHz (public safety and supporting services), and the Spectrum Task Force proceeding.

<sup>4</sup> *Memorandum Opinion and Order*, DA 04-3864, released December 9, 2004

FCC LMS-M rules. The NPRM now threatens this and ongoing due diligence and plans by proposing to change the current LMS rules regarding power and time of use. The Commission should allow Telesaurus to continue with its efforts and complete its proposed plans. Therefore, the Commission should not proceed to change the LMS-M rules. The Affiliates also agree with Telesaurus' Comments on this point.

The NPRM violates FCC rules and the Administrative Procedures Act for reasons given in Telesaurus' Comments, including since the NPRM ignored all of the comments in RM-10403 by Havens and Telesaurus and all other parties except Progeny. The NPRM is essentially rehashing what has already been briefed by parties with interest in RM-10403. As the Telesaurus Comments state, the NPRM should be terminated and the Commission should properly conclude RM-10403 by considering and deciding upon the various facts and arguments submitted by the parties. Only then can a request for rulemaking proceeding be properly concluded and a decision made as to whether to proceed with a notice of proposed rulemaking.

If, however, the Bureau proceeds with the NPRM, then the Affiliates support the positions of Telesaurus.

Respectfully,

*[Electronically submitted. Signature on file.]*

Warren Havens,  
Individually and as President of  
Telesaurus VPC LLC  
AMTS Consortium LLC  
Intelligent Transportation & Monitoring Wireless LLC

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May 30, 2006

## Exhibit 1

IATT Tech JV  
Telesaurus VPC LLC  
AMTS Consortium LLC  
Telesaurus Holdings GB LLC  
Intelligent Transportation & Monitoring Wireless LLC

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Jimmy Stobaugh, General Manager  
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Warren Havens and these four LLC's hold 7 to 8+ MHz of FCC geographic-licensed spectrum in most of the US for private mobile radio and location services, including for licensed-spectrum 802.16e and mobile broadcast applications focused on wide-area wireless for Intelligent Transportation Systems.

This includes 6 MHz in the 900 MHz Location and Monitoring Service ("LMS") band (904-909.75 and 927.75-928 MHz) in 80% of the nation, 1-2 MHz in the "AMTS" band (217-218, and 219-220 MHz) in 85% of the nation (and a second, adjacent MHz in some Western parts), 350 kHz of "VPC" spectrum (157/162 MHz) covering a number of Western States and Eastern California, up to 1 MHz of geographic 220-222 MHz licenses in much of the nation, and from 5 to 24 narrowband frequency pairs of "MAS" 900 MHz spectrum in many major and secondary markets in the nation (this may be combined with the 900 MHz LMS noted above to yield 28-46 12.5 kHz channels). Coverage maps and other information available.

The focus of these Companies is providing long-term spectrum and related system solutions for private wireless throughout the nation, including for enhanced major public safety and critical infrastructure wide-area projects, as well as for special situations and environments. To fund this long-term business, some of this spectrum is being sold or leased long term, from time to time.

The Companies are privately held, internally funded, focused on private-wireless business projects, and do not use any public marketing or website. Information appropriate for a prospective business relation can be provided under a mutual nondisclosure agreement. All licenses noted above are listed on the FCC's website's ULS database.

Mr. Havens is the President and majority owner of the Companies. Jimmy Stobaugh is General Manager. The Companies are operated from Mr. Havens' offices in Berkeley California. Mr. Havens has been involved in FCC licensing and wireless business since the late 1980's and previously was a founder and co-owner of a CellularOne service provider. He is also involved in nonprofit philanthropic projects including for nationwide wireless environmental monitoring.

Consultants include several former FCC Bureau Chiefs, SAIC Wireless Group, San Diego, and experienced wireless engineers. The companies' IATT Joint Venture is funding certain technology, product development, and testing via their consultants, including in integrated 802.16e, location, and broadcast technologies.

The Companies' long-term goals include use of their LMS 900 MHz spectrum and AMTS 200 MHz spectrum, in conjunction with adjacent spectrum used by Federal entities, including DHS, DOT, and USCG, for a new nationwide mission-critical PMRS service that provides narrow and wide channels for

PTT voice, IP data up to 1,000+ kbs, integrated location (terrestrial, GPS, and inertial guidance methods), telemetry, and interactive digital broadcast. Regional networks would be planned and pursued in this service, and eventually connected nationwide.

Also planned is ad hoc mesh networking capability, and integration with P25, 4.9 GHz, and 5.9 GHz ITS. Typically, dual 900 / 200 MHz would be used: the 900 MHz principally in urban and higher traffic areas, and the 200 MHz mostly in rural areas.

Principal contributors to these public-private regional networks would be the Companies and the noted Federal entities for spectrum, equipment companies for systems equipment, an integrator such as SAIC, San Diego (currently advising Telesaurus), for planning and execution, and utilities and rail for most of the system infrastructure (radio sites, links, etc.).

Principal core endusers of the systems, each on VPN basis, would be utilities and other critical infrastructure and transportation entities State and local public safety entities, and some Federal entities. Applications would include wide-area ITS-specific applications, with integration with ITS 5.9 GHz DSRC.

Public safety entities involved would have priority and preemption on the networks in emergencies, in addition to their day-to-day VPN use. Prior to build out of the networks and continuing thereafter, public safety entities would also have access to the spectrum for emergencies using caches of portable-repeaters and associated two-way radios.

The Public Safety VPN use would be on a subsidized low-cost basis, including due to the NTIA-DHS contributions made for their benefit, as well as tax deductions the Companies would obtain for certain contributions at no or below market cost.

One design goal of the systems and the venture is to qualify for substantial Federal funding to keep the costs low to Public Safety and certain Critical Infrastructure.

The networks would be initially built, or later enhanced, to provide substantial additional capacity to serve other entities with large vehicle fleets and mobile workforces.

Once built out, the networks would support on a nonprofit basis, very wide area environmental monitoring for protection, forecasting, warnings in emergencies, etc.

To date the Companies have completed, in the plan noted above: securing the described licensed spectrum foundation, due diligence in assessing the described markets and technologies, certain product development, the closing of and funding from transactions with major governmental and utility entities covering substantial parts of the nation to self-fund the above ongoing work, and substantial discussions with the principal Federal land and water governance agencies regarding shared spectrum, systems, and goals. We also maintain related businesses for current income.

More information may be provided under a nondisclosure agreement.

Exhibit 2: FCC *Memorandum Opinion and Order*, DA 04-3864, released December 9, 2004, granting a 3-year extension of time to Havens' LMS (now Telesaurus').

**Before the  
Federal Communications Commission  
Washington, D.C. 20554**

In the Matter of )  
 )  
Request of Warren C. Havens for Waiver of )  
the Five-Year Construction Requirement )  
for his Multilateration Location and Monitoring )  
Service Economic Area Licenses )

**MEMORANDUM OPINION AND ORDER**

**ADOPTED:** December 8, 2004

**RELEASED:** December 9, 2004

By the Deputy Chief, Mobility Division, Wireless Telecommunications Bureau:

**I. INTRODUCTION**

1. On December 3, 2003, Warren C. Havens (Havens) filed a Request to Waive the five-year construction requirement for his multilateration Location and Monitoring Service (M-LMS) Economic Area (EA) licenses.<sup>1</sup> For the reasons stated below, we find that the public interest would be served by granting Havens a three-year extension of the five-year construction requirement.

**II. BACKGROUND**

2. In 1995, the Commission established rules governing the Location and Monitoring Service (LMS) in the 902-928 MHz frequency band.<sup>2</sup> The LMS is intended to support the nation's transportation infrastructure and to facilitate the growth of Intelligent Transportation Systems through the use of location and transmitter tracking technologies.<sup>3</sup> There are two types of LMS systems – multilateration (M-LMS) and non-multilateration.<sup>4</sup> M-LMS systems are designed to locate vehicles or other objects by measuring the difference in time of arrival, or difference in phase, of signals transmitted from a mobile unit to a number of fixed receive points, or from a number of fixed transmitter points to the receiving unit to be located.<sup>5</sup> Non-multilateration systems are those that employ any technology other

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<sup>1</sup> See Request for Partial Waiver (Waiver of the Five-Year Construction Benchmark) (filed Dec. 3, 2003) (Waiver Request). On July 14, 2004, Havens filed an Amended Request, in which he is seeking a three-year extension of the construction deadline. See Request for Partial Waiver, Amended Request (filed July 14, 2004).

<sup>2</sup> Amendment of Part 90 of the Commission's Rules to Adopt Regulation for Automatic Vehicle Monitoring Systems, *Report and Order*, 10 FCC Rcd 4695 (1995) (*LMS Report and Order*).

<sup>3</sup> The term "Intelligent Transportation Systems" refers to the collection of radio technologies that, among other things, is intended to improve the efficiency and safety of our nation's highways. *LMS Report and Order* at 4698 ¶5.

<sup>4</sup> See *LMS Report and Order* at 4703 ¶14.

<sup>5</sup> *Id.*



than multilateration technology to transmit information to and from vehicles.<sup>6</sup>

3. In 1998, the Commission modified the M-LMS rules to allow more time for auction winners to satisfy their construction requirements.<sup>7</sup> The Commission concluded that a one-year build-out period was insufficient for M-LMS licensees because the one-year requirement was based on rules for site-based systems and it would be difficult for licensees to meet the deadline without raising a prohibitive amount of initial capital, and thus determined that such licensees would be required to construct and place in operation a sufficient number of base stations to provide M-LMS to one-third of an EA's population within five years of initial license grant and two-thirds of the population within ten years.<sup>8</sup> Havens holds fifty-two M-LMS licenses,<sup>9</sup> which he acquired in Auction No. 21. The licenses were granted on July 14, 1999, and had five-year construction deadlines expiring on July 14, 2004.

4. On December 3, 2003, Havens filed a request to waive the five-year construction requirement for his M-LMS Economic Area licenses in its entirety. On July 14, 2004, Havens amended his request to seek a three-year extension of the five-year construction requirement. On March 18, 2004, we sought comment on Havens' Waiver Request.<sup>10</sup> We received a single opposing comment from Mobex Network Services, LLC (Mobex), and a reply comment from Havens.<sup>11</sup>

### III. DISCUSSION

5. Pursuant to Sections 1.946(c) and 1.955(a)(2) of the Commission's rules,<sup>12</sup> a M-LMS license will terminate automatically as of the construction deadline if the licensee fails to meet the construction requirements for its license, unless the Commission grants an extension request or waives the LMS construction requirements. A waiver may be granted, pursuant to Section 1.925 of the Commission's rules, if the petitioner establishes either that: (1) the underlying purpose of the rule would not be served or would be frustrated by application to the instant case, and that grant of the waiver would be in the public interest; or (2) where the petitioner establishes unique or unusual factual circumstances, that application of the rule would be inequitable, unduly burdensome, or contrary to the public interest, or the applicant has no reasonable alternative.<sup>13</sup> Additionally, we may grant an extension of time to

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<sup>6</sup> *Id.*

<sup>7</sup> See In the Matter of Amendment of Part 90 of the Commission's Rules to Adopt Regulations for Automatic Vehicle Monitoring Systems, *Second Report and Order*, 13 FCC Rcd 15182, 15197-98 ¶30 (1998) (*LMS Second Report and Order*).

<sup>8</sup> *Id.* We note that section 90.155(d) of the Commission's rules, 47 C.F.R. § 90.155(d), provides that M-LMS systems must be constructed within twelve months from the date of grant. This section was not amended to reflect the Commission's decision in the *LMS Second Report and Order*, which applied to LMS auction winners. However, the five-year and ten-year construction requirements for these authorizations are listed on the licenses.

<sup>9</sup> See Waiver Request at Appendix A.

<sup>10</sup> Wireless Telecommunications Bureau, Mobility Division Seeks Comment on Warren C. Havens' Request for Waiver of Multilateration Location and Monitoring Service Five-Year Construction Requirement, *Public Notice*, DA 04-731 (Mar. 18, 2004).

<sup>11</sup> On April 30, 2004, Mobex filed a Motion to Accept Untimely or Supplemental Filing, along with Reply Comments, and, on June 10, 2004, Havens filed a Request for Leave to Late-File Table of Contents and Summary to Reply Comments. We hereby accept Mobex's late-filed Reply Comments and Havens' late-filed Table of Contents and Summary to his Reply Comments.

<sup>12</sup> 47 C.F.R. §§ 1.946(c), 1.955(a)(2).

<sup>13</sup> 47 C.F.R. § 1.925.

complete construction pursuant to Section 1.946(e) of the Commission's rules, if the licensee shows that the failure to complete construction is due to causes beyond its control.<sup>14</sup> The Commission has also stated that, in situations in which the circumstances are unique and the public interest would be served, it would consider waiving construction requirements on a case-by-case basis.<sup>15</sup> As discussed below, we find the circumstances set forth in Havens' Request warrant grant of an extension of time to meet the five-year construction requirement.

6. Havens contends that good cause exists to grant an extension. Specifically, Havens argues that M-LMS systems are unique because they must operate within particular technological parameters, such as co-existing with unlicensed devices and amateur radio service operations authorized under Parts 15 and 97 of the Commission's rules, respectively. Therefore, he notes that the development of multilateration location technology to operate commercially viable M-LMS systems has progressed slowly, and that no such equipment is currently available.<sup>16</sup> Havens contends that there has been no M-LMS equipment available in the market since he obtained his licenses in 1999. Havens states that he has undertaken substantial due diligence to fulfill construction obligations by attempting to develop advanced equipment for M-LMS systems.<sup>17</sup> Havens also contends that the unique attributes of M-LMS are similar to other services for which the Commission has not adopted an intermediate five-year construction requirement (*e.g.*, Wireless Communications Service) and only adopted a ten-year requirement.<sup>18</sup> Havens asserts that M-LMS shares certain characteristics with such services, including an undeveloped equipment market, unique operating requirements, and the promise of new and innovative services and, therefore, warrants similar treatment.<sup>19</sup>

7. We find that an extension of time of the five-year coverage requirements for the subject stations is warranted. Based on the totality of the record before us, we conclude that Havens has presented unique factual circumstances and that strict application of the construction requirement would be contrary to the public interest. We also agree that, in light of these circumstances, there is good cause to grant the request and that doing so will serve the public interest. First, we note that Havens' situation is unique in that no equipment is available, making it impossible for construction to occur at this time. Second, we note that the requirement in question is a five-year construction requirement, well in advance of the first renewal deadline for the licenses. Third, we note that the 902-928 MHz band is a unique spectrum sharing situation because it is available to multiple operations, including Government radiolocation systems; Industrial, Scientific, and Medical (ISM) devices; amateur radio operations; unlicensed devices; and licensed M-LMS operations. We believe this situation has contributed to the difficulty of M-LMS licensees in obtaining equipment, and are persuaded that the unavailability of M-LMS equipment is due to causes beyond Havens' control. We note that Progeny, another holder of numerous M-LMS licenses, has filed a Petition for Rule Making to change the M-LMS rules arguing that

<sup>14</sup> 47 C.F.R. § 1.946. Section 1.946(e) also enumerates specific circumstances that would not warrant an extension of time to complete construction. 47 C.F.R. § 1.946(e)(2)-(3).

<sup>15</sup> See, *e.g.*, Amendment of the Commission's Rules To Establish New Personal Communications Services, *Memorandum Opinion and Order*, 9 FCC Rcd 4957, 5019 (1994) (*PCS MO&O*), citing *WAIT Radio v. FCC*, 418 F.2d 1153 (D.C. Cir. 1969).

<sup>16</sup> Waiver Request at 3-5. Havens reports that, in order to remedy this situation, he and a company he controls, Telesaurus Holdings GB, LLC (Telesaurus), have undertaken efforts to develop equipment for M-LMS systems. Waiver Request at 5.

<sup>17</sup> See Request for Partial Waiver to Allow Ancillary Fixed Service, ULS No. 0001529701 (filed Nov. 26, 2003).

<sup>18</sup> Waiver Request at 6-9.

<sup>19</sup> *Id.* at 8.

the rules designed to promote sharing with other services are overly constraining and have contributed to the lack of equipment development.<sup>20</sup> For the reasons stated above, we believe the public interest is served by granting a three-year extension of Havens' five-year construction requirement. We believe that a three-year extension of the deadline will require Havens to actively pursue equipment development in the near term. Accordingly, we grant Havens' requests and extend the five-year construction deadline for the subject M-LMS Economic Area licenses from July 14, 2004, to July 14, 2007.

8. Mobex argues that Havens failed to demonstrate that he made a legitimate effort to obtain equipment.<sup>21</sup> Mobex further contends that the public interest will not be harmed by the denial of Havens' Waiver Request because the functional equivalent of M-LMS location service is presently available in the form of telematics,<sup>22</sup> and that grant of the request would be contrary to the purpose of construction requirements to ensure that services are provided promptly to the public.<sup>23</sup> We find that Havens has performed adequate due diligence and has provided evidence of several executed contracts reflecting that he has been actively exploring options for the deployment of LMS systems.<sup>24</sup> We reject Mobex's argument that Havens should have anticipated having to design and manufacture his own equipment, rather than relying on the only existing manufacturer at the time Havens bid for the spectrum.<sup>25</sup> In fact, Havens has provided evidence that he sought to obtain M-LMS equipment after the lone vendor of M-LMS equipment ceased to produce such equipment within the first year of the license term. Notwithstanding the availability of telematics, we find that there is an important public interest benefit in ensuring the utilization of M-LMS spectrum and promoting a variety of services to the public.

9. Mobex's also asserts that Havens' Waiver Request is similar to the requests which were denied in the *McCart* and *Hilltop Orders*.<sup>26</sup> We disagree. We note that neither party in the *McCart* and *Hilltop* cases had attempted to obtain equipment or remedy the lack of equipment, and in *Hilltop*, the extension request was filed nearly one year after the deadline had passed and the license had

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<sup>20</sup> See Petition for Rulemaking filed by Progeny LMS, Inc. (*Progeny Petition*), RM-10403 (filed March 5, 2002) at 15-16.

<sup>21</sup> Mobex Comments at 5.

<sup>22</sup> "Telematics" refers to vehicle navigation systems, such as OnStar, where drivers and passengers employ GPS to obtain directions, track their location, and obtain assistance when a vehicle is in an accident.

<sup>23</sup> Mobex Comments at 6-8.

<sup>24</sup> See Havens' Reply Comments at 1-2, referring to his Request for Partial Waiver to Allow Ancillary Fixed Service, which was filed Nov. 26, 2003. We note that Havens withdrew this filing on July 27, 2004. On July 22, 2004, Havens gave an *ex parte* presentation to staff of the Wireless Telecommunications Bureau, and, on July 30, 2004, he submitted documentation in support of his due diligence claims. This documentation includes evidence of consulting contracts, agreements for engineering studies, and memorandums of understanding which Havens entered into beginning in the first year of the license term for the purpose of developing a LMS system. We note that this documentation was submitted along with a request for confidential treatment in accordance with Sections 0.457 and 0.459 of the Commission's rules.

<sup>25</sup> See Mobex Comments at 5.

<sup>26</sup> Mobex contends that Havens' request is similar to two waiver requests which were denied by the Mobility Division of the WTB, and its predecessor, the Commercial Wireless Division, because, as in those situations, Havens cannot state when equipment will be available to construct his facilities. Mobex Comments at 6. Mobex cites In the Matter of Request for Extension of Time to Construct a 900 MHz Specialized Mobile Radio Station and Request for Waiver of the Automatic License Cancellation of Call Sign KNNY348, *Order*, 19 FCC Rcd 2209 (WTB, MD 2004) (*McCart Order*), and In the Matter of Request for Extension of Time to Construct an Industrial/Business Radio Service Trunked Station Call Sign WPNZ964, *Memorandum Opinion and Order*, 18 FCC Rcd 22055 (WTB, CWD 2003) (*Hilltop Order*).

automatically canceled. In contrast, Havens has undertaken efforts to develop M-LMS equipment. We also find that granting Havens' Waiver Request does not conflict with the Wireless Telecommunications Bureau's (WTB) decision in the *Nextel/Neoworld Order*,<sup>27</sup> as asserted by Mobex, where the WTB granted a sixteen-month extension of the construction deadline so that the affected licensees might deploy advanced digital systems that were not yet available. Specifically, licensees in the 900 MHz Specialized Mobile Radio (SMR) service could have used legacy equipment to meet construction requirements, but the construction of a more effective system would be possible by a certain date if an extension was granted.<sup>28</sup> We disagree with Mobex's assertion that the Commission has established a policy whereby requests for extensions of time to construct will not be granted unless the applicant has provided a "date certain" by which it will commence service.<sup>29</sup> In *Nextel/Neoworld*, legacy equipment was available and new equipment would be available by date certain. In this case, no equipment is available and Havens has provided the only evidence of possible equipment development.

10. We also note that the circumstances presented in this case are similar to previous instances in which we have granted extensions based upon equipment availability. For example, we have granted extensions of construction deadlines where licensees have demonstrated a commitment to deploying advanced technology under development and therefore unavailable in time to satisfy the licensee's construction benchmarks.<sup>30</sup> Similarly, we find that Havens has demonstrated a commitment to develop equipment and we also find Havens' failure to complete construction was due to causes beyond his control.

11. We find no merit in Mobex's argument that Havens' request is part of a pattern of delay in which he seeks to use his licenses in various bands for purposes other than those for which they are intended.<sup>31</sup> Such a conclusion is mere speculation and Havens does not seek a waiver of the technical M-LMS rules.<sup>32</sup> Further, we find that Mobex's argument that Havens' Waiver Request is in violation of

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<sup>27</sup> See In the Matter of FCI 900, Inc. Expedited Request for Three-Year Extension of the 900 MHz Construction Requirements and Neoworld License Holdings, Inc. Request for Waiver of the 900 MHz Band Construction Requirements and Petition for Declaratory Ruling, *Memorandum Opinion and Order*, 16 FCC Rcd 11072 (2001) (*Nextel/Neoworld Order*).

<sup>28</sup> Mobex essentially argues that relief was granted in the *Nextel/Neoworld* case due in part to the fact that they would obtain new equipment by a specific date, but Havens has not provided a date-certain guarantee of equipment. Mobex Comments at 5-6.

<sup>29</sup> *Id.* Mobex argues that the Commission has established this policy in the *McCart*, *Hilltop*, and *Nextel/Neoworld Orders*, as well as in the Matter of MARITEL, Inc. Request to Extend Construction Deadline for Certain VHF Public Coast Station Geographic Area Licenses, *Order*, 18 FCC Rcd 24670 (2003).

<sup>30</sup> See *Nextel/Neoworld Order*; Leap Wireless International, Inc., Request for Waiver and Extension of Broadband PCS Construction Requirements, *Memorandum Opinion and Order*, 16 FCC Rcd 19573 (WTB, CWD 2001) ("*Leap Wireless*") (granting extension of time so that licensee might deploy "high data rate" wireless technology that was not available in time to meet the five-year construction requirement); Monet Mobile Networks, Inc., Request for Waiver and Extension of the Broadband PCS Construction Requirements, *Order*, 17 FCC Rcd 6452 ("*Monet Mobile*") (WTB, CWD 2002) (granting extension of time so that licensee might deploy "high data rate" wireless technology that was not available in time to meet the five-year construction requirement); and Warren C. Havens, *et al.*, Request for Waiver or Extension of the Five-Year Construction Requirements for 220 MHz Phase II Licensees, *Memorandum Opinion and Order*, DA 04-2100 (adopted July 12, 2004) (granting extension of the five-year construction requirement for 220 MHz licensees to allow for the use of next-generation digital technology in the band).

<sup>31</sup> Mobex Comments at 8-10.

<sup>32</sup> In the event that Havens' future service violates our M-LMS rules, the Commission could take appropriate action.

Sections 1.946(e)(2) and 90.155(g) of the Commission's rules is misplaced.<sup>33</sup> These rules hold that extensions of time to construct or to commence service will not be granted for delays caused by the failure to timely order equipment; however, in this case there was no equipment available to order. We also reject Mobex's contention that a petition for rulemaking is needed for the requested extension.<sup>34</sup> Havens merely seeks an extension of the construction deadline for his licenses rather than global relief or wholesale change to the M-LMS rules.

12. Finally, Mobex contends that Havens' Reply Comments do not comply with Sections 1.49(b) and (c) of the Commission's rules and therefore should be dismissed.<sup>35</sup> Section 1.49(b) requires that all pleadings which exceed ten pages shall include a table of contents, and Section 1.49(c) requires that all such pleadings shall include a summary. As noted above, we have accepted Havens' belated filing of the required table of contents and summary, and we do not believe that his initial failure to comply warrants dismissal of the Waiver Request.<sup>36</sup>

#### IV. ORDERING CLAUSE

13. Accordingly, IT IS ORDERED, pursuant to Section 4(i) of the Communications Act, as amended, 47 U.S.C. § 154(i), and Sections 0.331, 1.925, and 1.946 of the Commission's rules, 47 C.F.R. §§ 0.331, 1.925, 1.946, that Warren C. Havens' request for an extension of the five-year construction deadline for his M-LMS EA licenses, filed on December 3, 2003 and amended on July 14, 2004, is GRANTED, and that the construction deadline is hereby extended until July 14, 2007.

FEDERAL COMMUNICATIONS COMMISSION

Thomas Derenge  
Deputy Chief, Mobility Division  
Wireless Telecommunications Bureau

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<sup>33</sup> 47 C.F.R. §§ 1.946(e)(2), 90.155(g).

<sup>34</sup> Mobex Reply Comments at 3-4.

<sup>35</sup> *Id.* at 4-6. 47 C.F.R. §§ 1.49(b) and (c).

<sup>36</sup> *See supra* n.11.

Exhibit 3: Certain Ex Parte Presentations of Havens and Telesaurus in RM-10403 in order of oldest to most recent

**Warren C. Havens**  
**Telesaurus Holdings GB LLC**

Via email, December 11, 2002

To: David Furth, Kathleen Ham, Richard Arsenault, Julie Knapp

Cc: Janice Obuchowski (counsel, Progeny), James Stobaugh

Re: RM-10403 (902-928 MHz)

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Dear Mr. Furth, Ms. Ham, Mr. Arsenault, and Mr. Knapp:

Concurrent with sending you this email, I will file a copy on ECFS as an Ex Parte filing in RM-10403 (the "Proceeding"). Thank you for your work on this Proceeding.

I understand that in the near future the Bureau will be acting upon the petition for rulemaking submitted by Progeny LMS LLC (commencing the Proceeding) by deciding whether or not to open a rule making docket to consider rule changes in 902-928 MHz, at least the LMS Multilateration blocks in this band ("LMS-M").

For myself and Telesaurus Holdings GB LLC, each of whom are LMS-M licensees in this band, I submitted Comments, Reply Comments, and various Ex Parte filings in the Proceeding.

I do not oppose any relief Progeny may seek for its LMS-M licenses. However, as discussed below, it does not appear to me that rulemaking for the entire LMS-M service is appropriate at this time, as long potential relief is available for specific LMS-M licensees and licenses based on waivers and possibly forbearance and other means.<sup>1</sup> I understand that such relief is available upon presentation of satisfactory showings.

For reasons I gave in my filings in the Proceeding, I will seek appropriate relief in relation to my specific "ATLIS" proposal for this band, a plan in development as I explained in my filings. It is a broad plan that has and continues to involve extensive dealings with industry trade groups, technology and equipment providers, system integrators, federal entities involved in Homeland Security, NTIA, and others. I expect to modify the plan per such dealings. I continue to pursue this plan and have proprietary developments underway, including for advanced technology and deployments for proof-of-concept and other purposes.

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<sup>1</sup> Among other appropriate public-interest reasons for certain relief for specific LMS-M services and deployments are various findings and recommendations of the recent FCC Spectrum Policy Task Force November 2002 Report. It looks to the public interest above other interests, and suggests a framework for consistency and dependability, all of which is very encouraging.

I have not gotten any feedback on this ATLLIS plan from any other LMS-M licensee, within and outside of this Proceeding. Also, no other LMS-M licensee has disclosed in this docket, or otherwise disclosed in any manner I am aware of, any plan as to what services they intend to pursue with their LMS-M licenses, what technology they are pursuing for any planned services, or other general or specific description of what they are undertaking to develop and use their LMS-M spectrum.

I have concern that the FCC can and will only once in many years undertake rulemaking in this band, and I believe that the best time for such rulemaking is when the licensees, at least those holding a clear majority of all spectrum, clearly set forth their planned uses of the spectrum, demonstrate their progress and obstacles to date, and in relation thereto, seek specific needed rule changes.

Also, if, as can be expected, the Commission adopts new policy along the lines of the Spectrum Policy Task Force November 2002 Report's recommendations, such policy may provide the framework for more efficient and lasting rulemaking in 902-928 MHz. That is, as this Report makes clear, the Commission does not have a well-defined spectrum policy at this time, establishing such is a Commission priority, and when it has this in place, or is further along in adopting key elements, it should provide a framework for appropriate regulatory reform in the various wireless services, including LMS-M.

Thus, my preference is to seek appropriate relief when needed specific to certain licenses, markets, technology, and service in my LMS-M development plan, and as this plan matures, I may seek appropriate rulemaking, hopefully, (i) in consensus or concert with other LMS-M licensees who may also have by then substantial plans, development and specific needs to present, and (ii) at a time when the Commission has adopted or is closer to adopting a spectrum policy to guide such rulemaking. Participation in a rulemaking at this time would divert resources from this priority. It may lead to premature conclusions: rules that do not fit well the needs of particular LMS-M licensee plans or Commission spectrum policy now in the making, and may thus need further amendment and give rise to excessive speculative contention.

Also, by that time, I would have (and other LMS-M licenses could have) undertaken various attempts to minimize potential disruptive interference from and to Part 15 devices and systems by various means and arrangements. As I have said in my filings in this proceeding, I seek a constructive dialog and solutions for this purpose, and I presented some initial ideas for this purpose. While a rulemaking may be needed at some point to deal with unresolved issues, it is not a good forum to attempt solutions and mitigate contention.

Further, since Federal entities via NTIA have priority use rights in this band (radiolocation use rights that are not much used, but still in effect), NTIA should be well informed of and ideally participate in any rulemaking, and, I believe, should be consulted by LMS-M licensees when pursuing their plans. NTIA did not participate in this Proceeding. Outside of the Proceeding, I have consulted with and will continue to



consult with NTIA and various Federal entities regarding my ATLIS plan and other plans. These plans have goals that include serving Federal wireless needs with 902-928 MHz. If NTIA and Federal entities choose to pursue these or similar plans, then based on their priority rights, their choice will have a major effect in the use of 902-928 MHz, independent of any FCC rulemaking. Again, as with other matters noted above, my concern is that rulemaking at this time seems premature: it is premature to obtain effective participation of NTIA and Federal entities it serves, since without presenting them with specific plans (uses, technology, deployments, etc.) that at least protect their interests (if not protect and promote them), I do not believe they will be responsive. If they are not responsive and in agreement, then development of LMS-M and its service to the public will be at greater risk, whether under current or amended rules or other forms of relief. I will continue to present my plans to NTIA, and as with Part 15 interests, pursue plans that attempt to minimize contention and facilitate mutually beneficial results.

Thus, for reasons given above, I do not believe it is appropriate to commence rulemaking at the present time regarding all LMS-Multilateration licenses.

Sincerely,

Warren Havens  
Individually, and as President of  
Telesaurus Holdings GB, LLC

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(510) 841 2220

**Warren C. Havens**  
**Telesaurus Holdings GB LLC**

Via email, February 3, 2003

To: FCC: David Furth, Kathleen Ham, Richard Arsenault, Paul D'Ari, Julie Knapp

Cc: Janice Obuchowski (Progeny counsel), and other non-FCC interested parties

Re: RM-10403 (902-928 MHz): (i) Progeny does not represent the LMS Multilateration Service nor is attempting consensus. (ii) Rulemaking is not appropriate at this time. (iii) Response to Progeny 10-10-02 White Paper

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Dear Mr. Furth, Ms. Ham, Mr. Arsenault, Mr. D'Ari, and Mr. Knapp,

Thank you for your work on the referenced matters. Concurrent with sending you this email, I will file a copy on ECFS as an Ex Parte filing in RM-10403 (the "Docket").

On 10-10-02, Progeny filed a technical white paper in the Proceeding (the "White Paper"). Thereafter, Itron and Progeny submitted filings related to the White Paper.<sup>1</sup> On 12-10-02, I sent you an email and filed it as an Ex Parte filing in this Docket (my "12-10-02 Filing"). Herein, I comment on these filings and related matters.

Progeny Does Not Represent LMS Multilateration;  
Rulemaking not Appropriate at this Time

For myself and Telesaurus Holdings GB LLC, each of whom are LMS Multilateration ("LMS-M") licensees in this band (herein, "Havens-Telesaurus"), I have submitted Comments, Reply Comments, and various Ex Parte filings in the Docket. On December 10, 2002, I sent you an email and filed it as an Ex Parte filing giving reasons why rulemaking in the LMS-M service is not appropriate at this time ("12-10-02 Filing"). I also noted therein that Havens-Telesaurus does not in principal oppose relief that Progeny may seek for its own licenses and plans, and that I may seek relief specific to my licenses and plans.

However, as indicated in my 12-10-02 Filing, rulemaking for LMS-M is not appropriate at this time, including because only Progeny seeks it, and Progeny seeks it without any coordination with and consensus among the holders of the rest of the LMS-M licenses.<sup>2</sup>

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<sup>1</sup> On 1-17-03, Progeny filed a 13 pages document in the Docket. This document does not appear to be related to the subject matters of the Docket. Thus, I do not address this filing.

<sup>2</sup> Havens-Telesaurus holds the majority of the rest of the LMS-M licenses (in MHz Pops and in geography), approximately 80% of the A-block LMS-M spectrum (in MHz Pops). Also,

Further, Havens-Telesaurus strongly objects to Progeny's repeated suggestions made in its filings in this Docket, including its "White Paper," that it speaks for the LMS-M service and other LMS-M licensees in terms of what LMS-M is, what it can and cannot do under current rules, how it will operate, what it will succumb to if its requested relief is not granted, what it needs, and so forth.<sup>3</sup> Progeny simply does not and cannot represent Havens-Telesaurus (or other LMS-M licensees from whom it has obtained no authority to speak) and it has not undertaken any consensus building.<sup>4</sup> Even with regard to its own relief proposals, it has not explained the service it plans to offer except if relief is granted except in the most general terms (some of which would not be permitted even under its proposed relief).<sup>5</sup>

Thus, Progeny's claims, arguments, views, admissions, and other statements in this Docket should be considered only in relation to relief it may seek for its own LMS-M licenses. For such relief, rulemaking is not the appropriate vehicle. Proceeding with such rulemaking in these circumstances will only lead to unnecessary contention,<sup>6</sup> waste of Commission resources, and diversion of or harm to efforts by Havens-Telesaurus to develop its LMS-M licenses in a manner noted in its 12-10-02 Filing: via attempts at cooperation with Part 15 and Federal entities operating in 902-928 MHz, in accord with the spirit and substance of the "Testing Requirement," noted below, and also consistent with suggestions in the Spectrum Policy Task Force November 2002 report, also discussed below.

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there is no evidence that Progeny has any support from the other LMS-M licensees. As Progeny knows, it did not in any way coordinate with Havens-Telesaurus its initial filing to commence this Docket, or any subsequent filing or action in this docket. Further, as reflected in the Havens-Telesaurus filings in this docket, there are many fundamental areas of disagreement, even as to what the current rules require and allow.

<sup>3</sup> A review of the Progeny filings makes clear that, rather than representing its case as based on its own plans, views, needs, etc., it represents these as what it thinks is needed by LMS-M service and licensees. (For example, in its White Paper, it represents that LMS-M systems may provide various services and may have various technical characteristics, and it is, after all, by all its filings in this Docket and related meetings at the FCC, seeking rule changes for the entire LMS-M service.) It has no basis for discussing hypothetical LMS-M operations other than its own.

<sup>4</sup> Havens-Telesaurus sought to cooperate with Progeny for purposes of common advancement of the LMS-M service. For its own reasons, Progeny declined. Havens-Telesaurus sought constructive communication with Progeny after its initial filing commencing this Docket. For its own reasons, Progeny choose to make all of its filings without such dialog.

<sup>6</sup> As I noted in my 12-10-02 Filing, I seek constructive dialog and voluntary synergistic relations with Part 15 users of 902-918 MHz as well as the priority-rights Federal users of this band, and Amateur radio users. A rulemaking docket is a poor if not doomed forum for such purpose.

### The Progeny White Paper

Regarding the white paper, Havens-Telesaurus may comment more substantially on it if the FCC proceeds with a rulemaking for the LMS-M service. At this point, Havens-Telesaurus makes the following comments:

Progeny alleges that its White Paper supports its 4-point request for rule changes (see page 1 of the White Paper), but it does not support any of these 4 items:

1) The White Paper has no relevance to item 1 (the spectrum cap issue).

2) In regard to its items 2 and 3 (more “flexibility” in providing a range of services with the spectrum)—even if the White Paper was adequate for its alleged purpose of demonstrating a certain lack of unacceptable interference by hypothetical LMS-M transmitters to Part 15 transmitters in the limited cases it dealt with, there is no direct connection between such demonstration and increased service flexibility: LMS transmitters can already, with no such increased service flexibility, transmit all of the time at any location (or “density” as per the White Paper), on all or most all of the licensed spectrum (with certain technologies), at any height and at up to the permitted maximum power levels. The Part 15 devices don’t care if the RF from the LMS transmitters carries more or less flexible services: that is, the type of service (e.g., interconnect or not) carried by the RF is not related to interference caused by the RF.

3) The White Paper is not necessary for item 4 (the “Testing Requirement” under §90.353(d)’s last sentence, and the Part 15 “Safe Harbor” under §90.361). In the White Paper Progeny does not explain what this technical study has to do with either the Testing Requirement rule or the Safe Harbor rule as they now exist, or as Progeny proposes to have them modified.<sup>7</sup> The Testing Requirement rule has been interpreted by the Commission<sup>8</sup> and

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<sup>7</sup> Progeny’s proposal in this regard is in the Appendix to Progeny’s Reply Comments in the Docket, where Progeny writes:

**I. I. I. Interference and Safe Harbor**

90.353(d)

*Existing language:*

“Additionally, EA multilateration LMS licenses will be conditioned upon the licensee’s ability to demonstrate through actual field tests that their systems do not cause unacceptable levels of interference to 47 CFR part 15 devices.”

*Progeny proposal:* Delete existing language and replace with the following:

“Multilateration LMS licensees will cooperate with other users of the 902-928 MHz band to mitigate interference between systems. LMS systems will utilize reasonable interference mitigation techniques where necessary to promote band sharing with existing Part 15 and Part 97 users of the band.”

does not require and is not satisfied by the White Paper.<sup>9</sup> Moreover, Progeny's proposal for change of this rule is not materially different from this existing Commission interpretation, and thus there is no ascertainable need for Progeny to make any demonstrations in the White Paper or otherwise on this Testing Requirement matter. Further, the heart of Progeny's rule-change suggestion (that LMS will, where necessary, use interference mitigation techniques) is not reflected in the White Paper. Finally, the White Paper does not factor in variables required for a meaningful study of LMS-M-to-Part 15 interference: see below discussion.

In regards to the Safe Harbor rule and Progeny's suggested changes to it (i.e., the appended language it proposes: see footnote 7 herein), the White Paper is not relevant to the rule as it exists, since this rule has nothing to do with demonstrations of non-interference by LMS-M to Part 15, and the White Paper is not relevant to Progeny's suggested change to this rule, since the change seeks to have Part 15 mitigate interference to LMS-M if this occurs.

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90.361

*Progeny proposal:* Append the following proposed language:

"In the event that operations under Part 15 cause harmful interference to LMS systems in the 902-928 MHz band, the manufacturers of the interfering devices, or where appropriate, the operators of systems or networks that employ such devices, shall cooperate with LMS licensees to mitigate such interference. The manufacturers or system operators will utilize reasonable mitigation techniques where necessary to promote band sharing with LMS systems."

<sup>8</sup> The Commission described what is and is not required by this Testing Requirement in the LMS Docket No. 93-61, MO&O, FCC 97-305 (rel. Sept. 16, 1997), ¶ 69: this was the last pronouncement on this Testing Requirement. Prior to that, in the same docket, Order on Recon, FCC 96-115 (rel. Mar. 21, 1996), ¶¶ 12-17, this Testing Requirement was discussed. The Commission made it clear that it declined to adopt specific technical guidelines for this Testing Requirement and noted appropriately that there are a multitude of ways for both LMS-M and Part 15 operations to fine tune their operations to lessen interference, and that it expected LMS-M and Part 15 system operator to work together on these matters (and it did not mean via adversarial contention in an FCC docket). There was no way then, and there is no way now, to come up with such guideline, at least without undertaking a very complex study such as the Telesaurus-Metricom Simulator had undertaken (see footnote \_\_\_ below) and such as the November 2002 Spectrum Policy Task Force report (the "Task Force Report") described as necessary for interference measurement and joint use of spectrum by a high-power and a lower-power service.

<sup>9</sup> This rule and its interpretation is specific to a LMS-M licensee's actual system as planned and deployed in relation to actual Part 15 systems in the subject geographic area. It does not involve theoretical simulations as in the White Paper.

As noted above, the White Paper does not involve the range of assumptions and make the range of simulations needed for a study to meaningfully model the effects by a LMS-M operation on various Part 15 device operations (or vice versa). Any useful model must simulate, for both LMS-M and Part 15, commercially viable services<sup>10</sup> with large numbers of base and end-user transmitters over a large area with high traffic. (If high traffic is not simulated, then the simulation is of a failed, non-viable, or spectrum-inefficient service.) The White Paper does not do this. Unless they are fully coordinated for mutual interference mitigation, no two services using the same spectrum, each without restriction in geography and time of use and each with substantial power (Part 15's 1 watt of power is substantial, and LMS-M's power is more substantial), will not in some cases cause harmful interference and in others not cause it. The questions should be: how much interference will be caused based on the multitude of variables involved in LMS-M and Part 15 market-wide services, assuming each has heavy traffic, and how to mitigate this via passive and/or active coordination of technologies and deployments.

Such a meaningful model or simulation, and such questions and their solutions, are complex matters to undertake.<sup>11</sup> First, the LMS service that is simulated must involve "multilateration."<sup>12</sup> The White Paper does not factor this in. Other variables, that must be included for both the LMS-M side, and the Part 15 side, include: (i) location of base and

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<sup>10</sup> And for each, especially Part 15, various "services" must be considered. Part 15 service includes Ricochet and the like (which aims at high traffic over fairly wide areas), meter reading and the like (low traffic), cordless phones (not coordinated by a system operator, unless wireless PBX, but nevertheless widely deployed in predictable patterns), etc. For LMS-M, very wide area vehicular service must be assumed, as well as portable service. LMS-M also involves constant or near-constant multilateration radiolocation, regardless of the level of permitted voice and data communication traffic.

<sup>11</sup> In a joint project, Havens-Telesaurus and Metricom completed the design of an expensive (in the "six figures") computer simulation of the effects of various types of LMS-M wide-area system operations on various types of Part-15 device wide-area system operations (the "Telesaurus- Metricom Simulator") (variable noted above and others were included). This project was cut short when Metricom filed for bankruptcy. However, it demonstrated the complexities involved, variables that must be considered, and the multitude of results (from little interference to great amounts, to both Part 15 and to LMS-M) depending on the variables employed. This Telesaurus-Metricom Simulator was consistent in its approach to determining levels of interference, and ways to passively or actively mitigate interference, to what is described in the November 2002 report from the FCC Spectrum Task Force on these matters.

<sup>12</sup> Multilateration for purposes described in the LMS rulemaking proceeding involves constant use of the LMS spectrum for ongoing location of large numbers of vehicles and other things. Not all of the spectrum capacity must be used. However, to not factor this in a simulation is unrealistic. (Progeny has not asked for any change to the fundamental rule requirement in LMS to provide multilateration location service.)

remote transmitters over a defined wide-area being studied such as an entire metropolitan area (and for these, which are indoors, which are outdoors, and related factors);<sup>13</sup> (ii) type(s) of modulation and power levels of all transmitters (these should vary with need); (iii) amounts of time each transmitter is in operation;<sup>14</sup> (iv) Quality of Service involved in both sides (e.g., Voice, Steaming, Background, Interactive) and in relation thereto, the data rate required and level of latency that is tolerable for each; (iv) passive or active co-channel interference mitigation techniques by the two sides to reduce interference between themselves; and other matters; etc.

The November 2002 Spectrum Policy Task Force report dealt well with fundamental issues involved in the above including: how to better define and measure interference, means to improve spectrum use involving sharing of spectrum by more than one service, means to limit interference between such services including via coordination between them. These are important issues that need resolution at a high policy level before proper application to LMS-M and other services. They are not likely to be resolved well in a near-term LMS-M rulemaking proceeding, sure to be adversarial, including via technical white papers from opposing sides that deal with a small subset of the variables that would or could be involved in LMS operations vs. Part 15 operations and point to no attempts to coordinate the services for mutual benefit.

For reasons given above and in the Havens-Telesaurus 12-10-02 Filing, the FCC should not at this time undertake rulemaking for the LMS-M service, and Progeny should cease representing its interests and views as those of the LMS-M service, which includes other LMS-M licensees. Progeny is free to seek relief it may desire for its own LMS-M licenses.

Again, thank you for your work on these matters.

Sincerely,

Warren Havens  
Individually, and as President of  
Telesaurus Holdings GB, LLC

2509 Stuart Street  
Berkeley, CA 94705

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<sup>13</sup> If outdoors, is the service mobile or peripatetic, and what is the terrain, vegetation, man-made infrastructure, etc.; if indoors, what is the nature of building in terms of radio-frequency penetration from and to the outside, etc.

<sup>14</sup> Assuming peak hours for each service, and non-peak, etc.

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**Warren C. Havens**  
**Telesaurus Holdings GB LLC**

Via email, October 10, 2003

To: FCC: David Furth, Kathleen Ham, Richard Arsenault, Paul D'Ari, Julie Knapp.  
Via ECFS, to other parties filing in the below-referenced docket.

Re: RM-10403 (902-928 MHz)

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Mr. Furth, Ms. Ham, Mr. Arsenault, Mr. D'Ari, and Mr. Knapp,

On February 3, 2003, I sent you an email regarding the above-referenced docket. Since then, certain parties involved with use of the subject 902-928 MHz band on a Part 15 basis ("Part 15 Entities") have submitted filings regarding this docket on ECFS. This responds to these filings as well as supplements my past filings. These recent Part 15 Entity filings mirror past filings by these and other Part 15 Entities in this docket.

My filing on 2-3-03 and my preceding filing on 12-10-03 presented a balanced approach that would allow Progeny to seek relief it sought for its LMS licenses outside a rulemaking which these Part 15 Entities oppose and which no other LMS licensee supports at this time. This would allow me and my company to proceed with our plans free from what is likely to be substantial hindrance by a rulemaking and the adversarial (and in large part artificial) contest it will create before the Commission, as discussed in these two earlier filings.

This approach, as described, was based on appropriate consideration of an effective plan for LMS consistent with sound Commission goals for LMS<sup>1</sup> (further noted below), the concerns of the Part 15 Entities, input received from FCC staff including OET, the FCC Spectrum Policy Task Force report of last November, interest from the marketplace including potential public and private end users of wide-area LMS networks, and current and emerging technology which may be employed to best meet these considerations.

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<sup>1</sup> While I believe some rule waivers or the like will be warranted in certain cases, these goals were and remain sound. Neither Progeny nor the Part 15 Entities deal with these goals in this docket, as far as I can recall, including use of the band for ITS functions, and cooperative efforts to coordinate LMS and Part 15 technology and operations to reduce interference and maximize use of the band. From the start, my company commenced this effort including via a major joint technical study with Metricom before it filed bankruptcy, by participation in the ITS community, and in other demonstrable ways. As noted herein, we are continuing pursuit of these goals.

The Part 15 Entities who have filed in this docket uniformly oppose any change in the rules. They generally base that on their position that they already make substantial use of the band and they fear that changes sought by Progeny would allow for increase in use of the band by licensed LMS operations which they believe would adversely affect their operations.<sup>2</sup> We believe these concerns are overstated, but that is common in such adversarial contests before the FCC or other authorities.

As indicated in my two previous filings, noted above (and numerous other filings in this and other FCC dockets),<sup>3</sup> my company's plans for LMS are intended to comply with and advance existing LMS goals and rules with regard to joint-use of this band with Part 15 Entities and providing unique highway-based service to advance ITS and compatible applications.<sup>4</sup> We are working on development of appropriate technology and equipment (and other development) for LMS under current FCC rules and policies for this band.

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<sup>2</sup> This position before the FCC is undercut by public financial filings of a number of such Part 15 entities where they do not disclose any such fears. A company cannot, for its existing and potential investors, fail to disclose material adverse risks concerning use of this radio spectrum, and yet before the FCC take a position that they are indeed subject to such risks. The fundamental risk from licensed LMS has nothing to do with the Progeny rulemaking proposal, but is established in the current FCC rules (Part 90 LMS rules, Part 15 rules) and the fact that the FCC licensed LMS throughout the nation.

<sup>3</sup> Including ET 02-135, WT 00-32, PR 92-257 and others.

<sup>4</sup> The planned vehicular-installed, highway-based LMS service using current and emerging technology will be unique and is needed for such ITS and related applications. When wireless service commenced decades ago and for a long time, vehicular installed radios and system architecture providing coverage for such radios ("Vehicular Service") was predominant or common and portable radios were rare. Now, almost all wide-area wireless (and all WLAN wireless) is based on small portables. We believe, including based on our proprietary studies and developments, that LMS can succeed by use of modern techniques to optimize Vehicular Service. This will also allow for spatial division for interference minimization between LMS system and end-user radios (respectively, on high HAAT antenna locations and mounted on vehicles, sometimes with "intelligent" antenna configurations) and Part 15 base transmitters and end-user radios (each using low-height antennas and either inside buildings or in a short range outside of them normally away from major highways and large parking lots where the LMS radios would be operating). This spatial-division means to minimize interference would be enhanced by other techniques, including to detect and avoid or mitigate co-channel and adjacent-channels signals, whether from Part 15 devices or from the LMS system devices. In addition, the LMS communication functions (in addition to multilateration) would be IP packet-data based, providing various QoS services each tolerant of substantial interference by Part 15 devices.

The goal of such joint use, including among licensed and unlicensed operations, should become increasingly important in a broad range of FCC radio services, as reflected in the Spectrum Policy Task Force report last November. The techniques needed are valuable not only for such joint-use but also for spectrum efficiency and other advances.<sup>5</sup> As this Task Force report noted, the commonly asserted scarcity of spectrum is more a function of wasteful un-intelligent techniques than actual congestion of radio spectrum (even the busiest bands do not involve use of most of the spectrum most of time in any particular area).

The LMS band could and should be a band in which substantial progress is made in this regard, both for its own benefit, and as test bed for broader applications. The current rules and Commission goals for this band call for such progress. The Commission goals for vehicular-based LMS applications including for ITS are even more important now than when the LMS rules were adopted and should also be supported and pursued.<sup>6</sup>

For reasons given above, my company and I oppose commencement of rulemaking for LMS at this time. It will likely hinder or derail the progress we are making with no counterbalancing benefit. The only possible benefit of rulemaking is whatever benefits Progeny may assert, but Progeny cannot assert these for other LMS licensees or for the entire LMS service,<sup>7</sup> and it is entirely free to seek these via rule waivers and other relief specific to its own licenses, due diligence, and plans.

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<sup>5</sup> While first-generation “multilateration” equipment was installed and used by Teletrac years ago, this failed in the marketplace and was been discontinued and Teletrac filed bankruptcy, and in any case, this equipment did not satisfy such goals of joint use and intelligent efficient use of spectrum even for the threshold “multilateration” function, and it provided only a nominal and non-competitive communication function (only slow-speed status messaging). Thus, it is not appropriate to attempt to revive and use this failed first-generation equipment for current and future LMS multilateration operations.

<sup>6</sup> In addition, the Commission has expressed its interest in support of shared networks, including on VPN basis, between private licensees and their users on the one hand, and on the other public safety entities and critical infrastructure entities. (E.g., see Commission statements in WT 00-32, cited in my company’s filing in this docket, and our discussion on this matter in that filing with respect to our “ATLIS” proposal involving LMS licenses.) The LMS band, with appropriate technology and systems focused on the goals noted above could be especially effective for this purpose. This does not require a rulemaking. Some of the critical-infrastructure entities that could be involved include those using the 902-928 MHz band for Part 15 based meter reading and the like. Again, our goal is intelligent cooperation, for which a contentious rulemaking is likely to disserve.

<sup>7</sup> Especially when its filings in this docket do not squarely address LMS-specific requirements and goals, including “multilateration” and ITS applications, and do not clearly indicate what type of service it seeks to pursue via the rules changes it proposes.

Sincerely,

Warren Havens  
Individually, and as President of  
Telesaurus Holdings GB, LLC

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Subj: **RM-10403 /Havens- Telesaurus**  
Date: Sunday, August 24, 2003 2:40:30 PM  
From: wchavens  
To: btramont@fcc.gov  
cc: general@g2w2.com, jstobaugh@telesaurus.com

Via email to:

Bryan Tramont, Senior Legal Advisor to Chairman Powell, at btramont@fcc.gov

Email cc to:

Henry Goldberg, Attorney for Itron, at general@g2w2.com

Email bcc to:

Jim Stahl, Chairman, United Telecom Council (UTC)  
Jill Lyon, Vice President, United Telecom Council (UTC)  
James Stobaugh, Telesaurus Holdings GB LLC

Dear Mr. Tramont,

Mr. Goldberg, in his August 12, 2003 email to you regarding the above-referenced docket, subject of his August 12, 2003 Ex Parte filing in this docket, cited a part of my Ex Parte filing submitted on ECFS on August 11, 2003 (incorrectly dated in October 2003). Mr. Goldberg apparently attached a copy of this filing. But in case it was not attached or did not transmit, I attach hereto the filing (in MS Word form).

As reflected in the attached and in my other filings referenced in the attached, I came to the conclusions in these filings--including that at this time rulemaking regarding LMS would be counterproductive-- after due consideration of Commission goals for LMS, the various aspects of LMS and Part 15 uses of the 902-928 MHz band, existing and emerging technologies to facilitate the above, and after consultation with FCC staff including at OET, and various current or potential end users of both LMS and Part 15 systems in this band including public safety entities and critical infrastructure entities such as power utilities. (As noted above, I am copying Jim Stahl and Jill Lyon at UTC on this email.)

As the Commission recognized when establishing LMS and related Part 15 allowances in this band, it was a bold experiment that would require work by LMS and cooperation with and by Part 15 interests to succeed well. This included addressing new ITS (Intelligent Transportation System)/vehicular-related services and markets, new technology, and reasonable coordination between LMS and Part 15 interests (also new): these are what my company, Telesaurus, and I have been and are focusing on. As discussed in the attached, this experiment and these endeavors are consistent with principal goals of the Spectrum Task Force as described in its November 2002 report. However, most filings in this docket are for positions, not solutions and cooperation, and to this end are overly simplistic and one-sided at best. Also, rulemaking takes far too long: e.g., a generation of technology, a capital-markets cycle, and a market window of opportunity, could all come and go in the time rulemaking takes, possibly making moot the rationale and/or substance of the original request, and at minimum making it a poor means of seeking relief.

Progeny, myself and my company, and other LMS licensees may seek focused relief for our respective LMS licenses and plans, with appropriate supportive showings. Given its nature, rulemaking at this time for the whole LMS service is not appropriate but will likely be counterproductive to the above-noted valuable experiment and needed work to make it succeed. Please see attached for elaboration on the above points.

I will file a copy of this email in this docket on ECFS as an Ex Parte filing. (Since the attachment hereto is referenced above and already filed in this docket, it will not be included.)

If you have any questions, please contact me.

Sincerely,

Warren Havens

President, Telesaurus, Berkeley California

(510) 841 2220 / direct (510) 914 0910

From: wchavens@aol.com  
Sent: Monday, October 25, 2004 12:34 PM  
To: Thomas.Derenge@fcc.gov  
Cc: peter.tenhula@fcc.gov; rarsenau@fcc.gov; MCFarquhar@HHLAW.com; jstobaugh@telesaurus.com  
Subject: New filings, LMS extension, and RM-10403  
Mr. Derenge,

Thank you for the recent status updates on below matters. I left you and Mr. Noel voicemails last week related to the these matters.

I will file this email in RM-10403. (The below matters will, however, be more fully covered in the filing noted next that will also be submitted in RM-10403.)

I will be filing within a few days, for purposes outlined below:

- A supplement to my pending LMS extension request applications.
- A filing in the "Progeny" docket, RM-10403.

I request a telephonic meeting with appropriate staff to go over the substance of these filings.

- Do you have time early next week?
- Can you suggest other staff persons for this purpose including key decisions makers in above two matters?

Please consider these filings, and the telephonic meeting discussion, prior to decision on my pending extension applications.

I am concerned that my narrow request is being delayed by Progeny's unrelated broad request and FRC's unrelated request.

I am further concerned that FCC staff have not understood my positive views on current LMS rules which are sound, the need for LMS in the marketplace and related excellent opportunities, and existing solutions (in the rules, and per available technology) regarding band sharing with Part 15 operations, etc. All of these views are well founded and easy to confirm as such in Commission rulemaking on LMS and the marketplace.

I am concerned that, instead, FCC staff have absorbed a negative and inaccurate view of LMS by filings and repeated meetings of other these other LMS licensees, especially Progeny, who needs to be negative on LMS to get relief since they are not engaged in actual development (little or none demonstrated in their filings).

I strongly disagree with the Progeny for reasons I will further present in upcoming filings and meeting communications. (I have to some degree covered this in past filings in RM-10403.) Progeny should have sought relief only for its own licenses per any due diligence and plan it could demonstrate. I have made clear in RM-10403 that I do not want LMS rules changed.

I also will comment on the FRC request, principally, that I have nothing to do with FRC and vice versa (apart from occasional casual discussions), including with regard to equipment and business due diligence.

My additional filings will also provide an update, mostly in confidential filings, on my work to complete LMS technical and business developments. I and my companies have committed and largely already spent over a million dollars

additional since our meeting last summer on these matters. This and further progress is being increasingly dampened and jeopardized by matters noted above.

Sincerely,  
Warren Havens



March 30, 2005

The Below email copy is hereby submitted by Warren Havens and Telesaurus Holdings GB LLC in RM-10403.

The Below email comments on the request by Progeny LMS LLC for a multi-year extension of its initial five-year construction deadline, via a rule waiver: A copy is submitted in this ECFS filing as a second uploaded attachment to the cover sheet.

For reasons noted below, Havens and Telesaurus believe that this Progeny extension / waiver request should be placed on Public Notice for comments.

They also believe that Progeny should have filed a copy of this extension / waiver request in this docket, since this request directly discusses matters central in this docket and since a grant of the request will clearly affect this docket including prolonging Progeny's attempt at rule changes via this docket.

The vast majority of commenters have opposed this Progeny rulemaking attempt. Only two other Multilateration LMS ("M-LMS") licensees supported Progeny to some degree. The largest other M-LMS licensee—and the only one who has demonstrated development of M-LMS for actual service—Havens and his company Telesaurus Holdings, oppose, for reasons clearly given in their most recent filings in this docket.

Warren Havens,  
Individually, and as  
President, Telesaurus Holdings GB LLC  
Berkeley, California

---

From: wchavens@aol.com  
Sent: Wednesday, March 30, 2005 12:43 PM  
To: mg@ftidc.com  
Cc: JO@ftidc.com; McMains@mcmainsmorse.com; Thomas.Derenge@fcc.gov;  
dlmartin@hhlaw.com  
Subject: Re: FCC extension request [of Progeny LMS LLC]

Mary,

I am copying Mr. Derenge at the FCC on this matter.

I am submitting a filing regarding your extension request this week. I had planned to and will of course mail a copy to you. I earlier inquired of Mr. Derenge about your request and indicated that I thought it should go on PN and that I intended to submit a filing on the request.

The below covers in summary fashion some of the principal matters that my

filing will cover (if there are any conflicts, my filing will prevail over the below):

My position is that your extension request must be put on PN, including since the outcome of the request will affect your competitors, including me as you point out in the request, as well as the other parties in 902-928 MHz, including since, as the request makes clear, a grant will allow you to continue with RM-10403 (and see below: your request also continues to argue your case for rule changes). You do not seek an extension to meet construction and operating requirements under current rules, but you continue to assert, in the extension request and new filing in RM-10403, that without rule changes Multilateration LMS is not viable.

Putting the request on PN is also required for fair and equal treatment of competitors: my request was put on PN and did result in substantial opposition, and your must as well. Going through PN and subsequent public challenges (or even support) places major burdens on a licensee in time and cost, as well as risk. It is unfair to place this burden and risk upon one licensee and not on its principal competitor. As you point out in your request, under LMS rules, Progeny and I are competitors: the M-LMS rules do not allow any licensee to obtain more than 8 MHz: you have 8 MHz and I have the rest, 6 MHz, in most of the nation.

In this regard, your extension request poses entirely different issues than mine:

- I sought more time to complete specific required multilateration equipment development: I identified the technology, the products, their integration with permissible M-LMS communication radios, the vendors, my technical advisors, a timeline, the type of end users (mission-critical private-radio market segments), etc.-- and to place M-LMS systems into service under current rules with no other relief sought. I began this in earnest right after getting the licenses and continued it without break and demonstrated this in several hundred pages of due-diligence filings: and of these, the essence was filed publicly, including the specific type of technologies and products I was developing, the specific types of service and end users etc. This included graphic depictions and text.

- You seek an extension to continue to attempt to change rules, not to meet the construction requirement under current rules: the only construction requirement in M-LMS is defined Multilateration, which you state is not viable, is obviated, due to GPS etc. (That is not supported in actual marketplace developments and deployments regarding wide-area urban/rural systems: a combination of terrestrial multilateration and A-GPS is needed for good performance in the various environments involved.) You also do not describe the M-LMS service, technology, products, end users, etc. that you would serve if you get the

rule changes you seek.

I believe your request cannot be granted under waiver standards and precedents, including for reasons indicated above. Reasons include that it would be futile to grant the requested waiver under current rules since without rule changes you state that Multilateration is obviated. I also do not see any specificity to your generally asserted due diligence. To "survey" vendors really only indicated that no actual effort was made to develop the required Multilateration products. Of course vendors will not respond when you expect them to do all the work at their expense and risk, especially when your position is that Multilateration is "obviated" and will fail.

My understanding is that a licensee may have the right to an extension if the FCC grants a petition for rulemaking, since in such grant the FCC is at least tentatively accepting that there may be a need for relief, and would thus grant a modest extension to explore that. I do not believe that, given your position in RM-10403 and your extension request, you are otherwise entitled to an extension under waiver standards and precedents.

I believe you should have copied me on your extension request since you characterize, out of context, some things I submitted in RM-10403: my last filings in that docket make it clear what my position is and that is my only position.

Also, I believe were required to file this request in RM-10403 since the request seeks more time for you to continue seeking the relief you seek in that docket and since the request continues arguing the substance of your position in that docket to decision makers.

Sincerely,  
Warren Havens

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In a message dated 3/30/05 10:37:43 AM, mg@ftidc.com writes:

<< Dear Mr. Havens--

During a status check at the FCC concerning Progeny's extension request for the five-year M-LMS construction requirements, it came to our attention that you filed an informal comment on the pending request.

We have not yet received a copy in the mail. If you would be able to provide a copy to us of the informal input you have furnished to the Commission on Progeny's request, that would be greatly appreciated.

Thank you very much.

Regards,

Mary Greczyn  
Freedom Technologies  
1317 F Street NW  
Fourth Floor  
Washington, DC 20004  
202/393-4531  
>>

Subj: **Request under Sec. 1.41: (1) clarification, (2) Progeny ex parte filings**  
Date: Sunday, May 15, 2005 11:13:49 PM  
From: wchavens  
To: WTBSecretary@fcc.gov  
cc: Thomas.Derenge@fcc.gov, mg@ftdc.com, JO@ftdc.com, dlmartin@hhlaw.com, jstobaugh@telesaurus.com, wchavens

To: FCC Office of Secretary  
Attn: Chief, WTB

**Before the  
Federal Communications Commission  
Washington, D.C. 20554**

In the Matter of	)	
	)	
Progeny LMS, LLC	)	File No. 0002049041 et seq. <sup>1</sup>
Waiver Requests for Extension of the	)	
M-LMS Five-year Construction Requirement	)	

To: Office of the Secretary  
Attn: Chief, Wireless Telecommunications Bureau

Request Under Section 1.41  
To place on Public Notice  
Or Alternative Action

1. Clarification

The below captioned filing, submitted on or about 5-2-05, is hereby clarified as described below. This is filed electronically by email pursuant to FCC 01-345, released 11-29-01, which is still in effect.

On page 2 of this Section 1.41 Request, the defined "Petitioners," listed below, asked that the subject Progeny extension request be placed on Public Notice in which case they would submit a formal petition to deny. Later in this filing, the text, in error, stated that if the Progeny extension request were placed on Public Notice then the Petitioners would submit an informal petition to deny. Petitioner clarify that what was first written on page 2 is their intent: to submit a formal petition to deny if allowed to do so by the FCC placing the Progeny extension request on Public Notice.

2. Progeny Ex Parte Filings in the Progeny extension request proceeding, and in the intertwined Progeny rulemaking request proceeding, RM-10403.

For reasons stated in the 1.41 Request, the Progeny license extension request, referenced in the caption above, and the Progeny M-LMS rulemaking request subject of RM-10403, are clearly

interrelated and intertwined, as is evident in the texts of the Progeny filings in these two proceedings. The Progeny extension request is a restricted proceeding under Section 1.1208 (" . . . all waiver proceedings . . ."), and the Progeny rulemaking request is a permit-but-disclose proceeding under Section 1.1206. The Petitioners listed below, with regard to the Progeny license extension request, are each a "Party" as defined in Section 1.1202 (" . . . a person who files a[ ] . . . waiver request . . . and any person . . . filing a written submission referencing and regarding such pending filing which is served on the filer . . . ") (also, see the "Examples" at the end of Section 1.1208).

For years, referencing RM-10403, Progeny has filed a large number of ex parte filings of oral presentations in meetings with FCC Commissioners' offices and other FCC staff. These do not "summarize[ ] the new data or arguments" as required under Section 1.1206(b)(2). Petitioners thus believe Progeny has for years violated Ex Parte rules and appropriate sanctions under Section 1.1216 should be imposed.

The Progeny license extension request, referenced in the caption above, contains arguments in support of the Progeny rulemaking request and thus Progeny had to file it in RM-10403 under Section 1.2106(b)(1). Progeny failed to do so. Appropriate sanctions should be imposed under Section 1.1216.

After submitting its license extension request, Progeny has engaged in written and oral "presentations" (as defined in Section 1.1202) in the name of its rulemaking request but which contain arguments that bear upon the substance of its license extension request. The written presentations were not served on the below-listed Petitioners, who are Parties (see above). These oral and written presentations in this restricted proceeding are prohibited under Section 1.2108. Appropriate sanctions should be imposed under Section 1.1216.

In accordance with Section 1.1214, Petitions will provide a copy of this to the FCC Office of General Counsel.

In accordance with Section 1.1206(b)(1), a copy of this email will be filed in RM-10403 on the ECFS.

The undersigned certifies, under penalty of perjury, that he shall cause a copy of this electronic filing to be served on Progeny by email (in the same email as used to submit this filing) by service on Progeny counsel:

mg@ftidc.com,

JO@ftidc.com, and

Mcmains@mcmainsmorse.com,

and, in addition, by a paper copy mailed on 5-15-05 by USPS first class mail to Progeny counsel at:

Progeny LMS, LLC  
Albert Halprin  
Janice Obuchowski  
Halprin Temple  
1317 F Street NW  
Washington, DC 20004

Respectfully,

*[Signature on file]*

Warren Havens,  
Individually and as  
President of:  
Telesaurus Holdings GB, LLC  
Telesaurus VPC LLC  
AMTS Consortium LLC

2649 Benvenue Ave., Suite 2  
Berkeley, CA 94704

Monday, May 15, 2005

(1) The following two filings by Havens/ Telesaurus oppose the Progeny request to extend its LMS-M licenses, and also further oppose Progeny's seeking rule changes in RM-10403.

(2) Progeny's extension request is based on essentially the same Progeny assertions expressed in RM-10403 as to the past failure and lack of future viability of LMS-M. For this reason, and the reason noted next, filings in the Progeny extension request proceeding must also be filed in RM-10403.

Progeny failed to do so.

(3) Further, after mid 2005 when the construction deadline for Progeny's LMS-M licenses passed (without the extension request being granted), Progeny's lost standing to make further attempts in RM-10403 including the ex parte meetings Progeny had with Commission staff. The only practical goal of such meetings was to obtain support for the only relief that, at such time, Progeny could obtain, which is an extension request grant to revive its LMS-M licenses. Since the extension request proceeding is a opposed, restricted proceeding, such ex parte meetings were prohibited. In addition, the dozens of Progeny ex parte meetings allegedly for purposes of RM-10403, were prohibited since Progeny never filed written summaries with the clear descriptions required in the rules.

(4) Progeny commenced RM-10403 privately, with no support from or coordination with Havens, Telesaurus, or others that held LMS-M licenses, or others with interests in 902-928 MHz. Similarly, Progeny has attempted in various ways to obtain an extension of its LMS-M licenses in a private proceeding, speciously suggesting that grant of such request was essentially a decided matter of law and that it performed required due diligence to develop and obtain required LMS-M equipment, when, after FOIA-based release of its confidentially filed alleged proof of due diligence, such allegations were shown to be false.

(5) The Commission should conduct proper public proceedings on matters of major interest to other parties,



where the facts and questions of law are not decided, as in the case of the Progeny license extension request and this intertwined RM-10403 proceeding, and the Commission should prohibit and sanction prohibited ex parte communications in such proceedings, as has occurred extensively in these two Progeny proceedings. Otherwise, the proceedings are unfair, anti-competitive, and defective, and unnecessary and wasteful administrative and judicial appeals may ensue.

Respectfully submitted, 12-21-05 (Pacific time),

Warren Havens, individually, and for  
Telesaurus Holdings GB LLC, and affiliates

**Before the  
Federal Communications Commission  
Washington, D.C. 20554**

In the Matter of	)	
	)	
Progeny LMS, LLC	)	File No. 0002049041 et seq. <sup>1</sup>
Waiver Requests for Extension of the	)	
M-LMS Five-year Construction	)	
Requirement		

To: Office of the Secretary  
Attn: Chief, Wireless Telecommunications Bureau

Reply to Response (“Progeny Reply”) to Opposition<sup>2</sup>  
Erratum Version\*\*

Warren Havens (“Havens”), Telesaurus Holdings GB, LLC (“THL”), Telesaurus-VPC, LLC (“TVL”), AMTS Consortium LLC (“ACL”), and Intelligent Transportation & Monitoring Wireless LLC (“ITL”)s (together the “Opponents”)<sup>3</sup> jointly and severally submit this reply (the “Reply”) to Progeny’s response (the “Response”—see footnote above) to Opponents’ opposition (the “Opposition”) to the above-captioned waiver request applications of Progeny LMS, LLC (“Progeny”) to

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<sup>1</sup> This is the first file number of these applications, filed 2-15-05, as listed on ULS.

<sup>2</sup> Progeny entitled their responsive pleading a “Reply to Opposition” although per the Settlement, it was to be called a “Response”. For purposes here, Opponents refer to Progeny’s filing as the “Response”.

\*\* There are no changes in substance. Changes consist of: (1) adding a table of contents, (2) corrections of margin alignment and spacing in footnote text, (3) adding page numbers, (4) adding a title for section 7, (5) line-through of two words. (Spelling “typos” not corrected due to Progeny's past objection to simple non-substantial corrections.)

<sup>3</sup> Havens is the majority interest holder and President of THL, TVL, ACL, and ITL.

extend the five-year construction requirement deadline (the “Construction Requirement” and the “Deadline”) of all of Progeny’s Multilateration Location and Monitoring Service (“M-LMS”) licenses (the “Progeny Licenses”) (the “Extension Request”). This is submitted pursuant to the settlement agreement regarding FOIA Control No. 2005-449 (an FOIA request submitted by Havens) among Progeny, Havens (for himself and the above noted LLC entities he controls) and the FCC Wireless Telecommunications Bureau (the “Bureau”) via email exchange reached on or about November 14, 2005 (the “Settlement”).

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8	7. Even Threshold of Due Diligence Absent
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### 1. Summary

The Opposition referenced and incorporated identified past filings by Opponents pertinent to the Request that were also served upon Progeny.

Progeny failed in the Response to refute the facts, arguments and conclusions in the Opposition. For those reasons, as further shown below, the Request should

be denied, the Licenses deemed automatically terminated for failure to meet the now-long-past construction deadline, and the Licenses re-auctioned. If at that time Progeny decides to pursue M-LMS under the existing rules, including bonafide efforts to develop or obtain required equipment, it may do so on an equal footing with other interested parties including Opponents if deemed qualified.

FCC licenses are not a mandate to construct or expend substantial funds and efforts to attempt to obtain or develop equipment to construct, under penalty for failure.<sup>4</sup> They are an option to do so, and upon failure the option automatically terminates at the construction deadline. Progeny stated to the Commission emphatically and repeatedly in the public RM-10403 proceeding (including in *dozens* of ex parte meetings), with no change to this day—and thus also to all potentially capable equipment developers and providers, and end users, and operational partners—that M-LMS was a failure and would continue to fail, and that the only required M-LMS service to meet the construction and service requirement, defined multilateration, was obviated, superceded by GPS and CMRS location services, could not co-exist well with Part 15 use, was not viable, and the like.<sup>5</sup>

Progeny took its Licenses option, placed it solely on its attempt at new rules, and failed.<sup>6</sup> Its Licenses automatically terminated at the construction deadline

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<sup>4</sup> Unless such failure is deemed a disqualification of future licensing for lack of any effort, or for apparent intent at trafficking, or the like.

<sup>5</sup> Progeny also failed to address concerns of Federal priority-rights use under its proposed new rules.

<sup>6</sup> As the Bureau and Progeny know, when the Commission grants a request for rulemaking concerning substantial new rules (such as Progeny requested) or on its

since its Extension Request entirely failed to meet any prong of the waiver standards, and it is otherwise unambiguously not in the public interest, convenience, and necessity under 47 USC 309 to extend license authority to a party who could not more clearly reject the authority—the Commission’s intend and requirements of M-LMS expressed in M-LMS rules and rulemaking orders.

## 2. Bruce Fox/ FRC Extension

Progeny’s sole partially valid argument is that the Bureau granted to Bruce Fox, FRC, an extension request and Progeny is similarly situated. Like Progeny, Bruce Fox did no substantial due diligence, if, as Opponents assert based on FCC precedent, that means: substantial expenditure of time and funds to develop and obtain at least *the required* equipment when it is not already available for purchase, and pursuit of this from soon after the licenses were granted until the date of the construction request, with demonstration of continuation until a projected success, and proof of such action by documentation from the parties involved, by some authorized officer, owner, or the like—not unsupported assertions by the licensee that would never stand up in any court or other due process hearing. Both Progeny and FRC merely asserted that they check out the market and found no M-LMS ~~multilateration~~ equipment (there did not even assert that they were

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own motion commences such rulemaking, that in itself may be good cause for an grant of a construction deadline for licenses subject to the potential new rules. Progeny filed its request more than three years prior to its five-year construction deadline. In that time (and to this day) the Commission did not grant the request. Thus, there is no question that Progeny had more than ample time to either succeed in this, or to abandon it in sufficient time, if it had a genuine change of view as to the viability of M-LMS under the rules, to engage in substantial due diligence to meet the construction requirement. It did not do so for reasons noted in the Opposition and this Reply.

looking for multilateration equipment) sitting there for easy purchase. However, while FRC generally supported the Progeny rulemaking request, the FRC support was not in the order of magnitude as Progeny in clear and repeated proclamation of M-LMS service that was obviated and not viable to pursue under existing rules.

In any case, Opponents have pending a petition for reconsideration of the grant of the FRC extension. Opponents do not believe that extension grant will pass muster on appeal.

### 3. Progeny Failed to Contact the One Known Equipment Development Source

Progeny cited the Havens M-LMS extension grant. That Havens extension grant, as did the request and its attachments,<sup>7</sup> made clear that Havens had engaged companies to complete certain required M-LMS multilateration equipment and permitted M-LMS communication equipment. Progeny could have contacted Havens at least (see below) upon seeing this request filed, which was in year 2003, to explore joining in Havens' efforts to complete this development. In addition to being able to see this obvious source of equipment development in the Havens extension request, Havens had made substantial efforts to have Progeny (and FRC) enter any sort of reasonable business arrangement whereby they could jointly fund and develop required and useful M-LMS equipment.

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<sup>7</sup> The request referred to another filing then pending by Havens with due diligence materials. The materials were submitted under a request for confidentiality. However, Havens also presented to the FCC staff at a meeting at FCC offices a summary of his extension request which included summary sheets, and these were publicly filed. In addition, a Progeny sought these documents under a valid FOIA request, Havens would have agreed to release redacted copies similar to the procedure he proposed that was ultimately accepted in this proceeding. Thus, summaries of there were available to Progeny immediately, and the rest would have been, with appropriate redaction.

For this purpose, Havens, in the first several years after the first M-LMS auction, met with Progeny's owner, counsel, and other representatives many times at their offices in Indiana and in Washington DC.<sup>8</sup> He had similar meetings with Bruce Fox, sole owner of FRC, and a joint meeting with Fox and Progeny. These attempts by Havens are documented in various writings. As Progeny and its Indiana counsel know, Havens did not oppose the grant to Progeny of the extraordinary waiver required for Progeny to be granted the Licenses after the auction, for the reason that Progeny's owner, Mr. Frenzel and his counsel, Mr. McMains, asserted to Havens that they would actively develop M-LMS. While Havens and Progeny each understood the M-LMS rule that places a spectrum cap on M-LMS ownership at 8 MHz, and thus the need to compete in deliver of services in the marketplace, cooperation to develop equipment was reasonable and permissible under FCC and other law. After multiple attempt by Havens, neither Progeny nor FRC would agree to undertake any joint efforts with Havens at development of needed and useful M-LMS equipment.

As Havens indicated in his petition for reconsideration of the FRC extension grant, he is not under an obligation to give away for no consideration the proprietary information and rights secured in his M-LMS equipment development. He does not of course claim that Progeny or FRC must join him in his M-LMS equipment development undertakings. However, had either Progeny or FRC been willing to share costs, or enter a commercially reasonable arrangement, he would

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<sup>8</sup> This entire filing is under a declaration under penalty of perjury.

have given it consideration and probably accepted it—that was his proposal to each of them.

This, by itself, makes clear that neither Progeny nor FRC actually sought M-LMS equipment, since the one known party who was developing it was not even approached.

#### 4. Progeny Asserted Due Diligence Materials

For reasons noted above and in the Opposition, such materials failed to demonstrate that Progeny undertook any due diligence at all. Evidence in a due process relief proceeding is not bald assertions by the beneficiary of the sought relief, but by third parties. If indeed, as Progeny initially baldly asserted (in the Extension Request) it understood substantial due diligence to obtain the required equipment, it would have obtained and presented specifics, including key documents from the parties with whom such undertakings had been pursued. Clearly, all Progeny did, if anything, was make some calls, a sort of “survey” as Progeny writes. It gives no evidence even of such a survey. This is not due diligence.

It is not credible to even assert that a survey would ever result in any luck. As Progeny admits in its Response, equipment companies were not interested in equipment based on current rules and Part 15 use under such rules. Thus, no such company would ever make the equipment, and thus, there was no reason to survey a few times, as Progeny asserted.

Progeny had to spend money and make long term commitments to compel a company to develop then make and supply required M-LMS equipment and any



additional permitted equipment. Its due diligence materials show that it entirely failed to do this.

#### 5. Precedents Do Not Support Grant

See Exhibit 1 hereto, whose text is incorporated herein. Progeny failed to address these precedents. These precedents require denial of the Extension Request.

Moreover, the Opposition was correct that under all precedents cited (which included those in Exhibit 1, which were in the main documents referenced and incorporated in the Opposition as its main argument), the Progeny Extension Request fails, including since it is uniquely extreme case where the requesting licensee has rejected the service which it seeks an extension to construct.

If the Bureau grants the request, the precedent would entirely gut the meaning of a waiver request—any such request for any reason would have to be granted.

#### 6. Progeny Part 15 Claims Are Insufficient and Inaccurate And Against Clear Public Interest

In its Response, Progeny again asserts as it has in RM-10403 and in the Extension Request that Part 15 use of the band causes difficulty. Of course it does: that was as clear as possible in the nature of M-LMS, in all M-LMS rulemaking and in its rules. This is not an exclusive band. Progeny bought the licenses with this condition, and with there being no equipment ready to buy.

However, it is clear that Part 15 equipment can co-exist with other Part 15 equipment in the same band. The FCC Spectrum Task Force report and numerous other proceedings (on Part 15, cognitive radio, TV spectrum white space for 802.22

unlicensed equipment, etc.) all make clear that licensed and unlicensed services and equipment not only can coexist, but this is a highly important that this goal be pursued. M-LMS is band in which the FCC set this as a goal long ago. Equipment being developed internationally for WiMax (the 802.16 family of standards) operates both in licensed and unlicensed bands, another example that advanced communications can work well in bands with multiple authorized users in an area (which is the fundamental nature of unlicensed service).

Thus, this assertion by Progeny fails. Yes, licensed equipment in band where unlicensed equipment is allowed has challenges. But this was a task M-LMS licensees all bought into by buying the licenses, and it is feasible to accomplish with reasonable due diligence (actual expenditure of substantial money and expertise).

#### 7. Even Threshold of Due Diligence Absent

Progeny did not assert in its alleged due diligence materials that it had any contract with any equipment development or equipment provider entity, not even a nondisclosure or confidentiality agreement. Havens, and his advisors, including two the leading wireless engineers in 3G technology, have discussed M-LMS equipment with virtually all providers of multilateration equipment and 3G wide-area mobile communications equipment. No such communication becomes serious without entering a mutual nondisclosure agreement, since each side had proprietary information that must be disclosed to seriously consider a contractual relation to develop or co-develop such equipment. Not once, in hundreds of communications with such companies, has any of them mentioned being contacted, surveyed, or otherwise dealing with Progeny.

## 8. Additional Facts and Arguments

Progeny did not directly address McCart and Hilltop Orders that were incorporated and referenced by Havens in the Opposition at page 5 and Attachment 2, #2.. Progeny did not reference and incorporate its previous opposition filings that attempted to refute these orders, so Progeny in the instant proceeding has not refuted applicability of McCart and Hilltop Orders. See Exhibit 1 below for the arguments raised by Opponents. McCart and Hilltop dealt with companies that, despite there being no equipment available, had done nothing to pursue equipment development on their own and thus were found not to have met the requirements for grant of an extension. Progeny's extension request is likewise completely "open-ended" and thus must be denied.

Contrary to the Response, Progeny has not shown they have conducted extensive and ongoing due diligence. In fact, Progeny's due diligence is entirely based upon Progeny's own assertions— (i) its "survey" and "periodic reviews" (Response ~~Reply~~ at page 11) appear to have only consisted of reviewing manufacturers websites for equipment in 902-928MHz, which could have been done in an afternoon, and Progeny doesn't even state when the survey or periodic reviews actually occurred, (ii) it contains no declaration or affidavit under penalty of perjury from an officer of Progeny, (iii) it provides no actual proof of communications with vendors, manufacturers or end users, including any letters, emails, contracts, understandings, or other substantial communications with such entities, (iv) it does not specify the person(s) who conducted the alleged due diligence or identify specific person(s) contacted at vendors or manufacturers, or give the date or period of time

when any communications occurred and (v) it does not provide any evidence of any in-person meetings with equipment manufacturers or possible end-users. In addition, it gives no details of the type of equipment it may be pursuing for any location-based service and does not state with which manufacturers it has or is currently discussing development of such a product, despite the fact that at this late date Progeny realistically should already have some agreement(s) in place to develop multilateration equipment because, even if the extension were granted, it would need the equipment rather soon to meet its construction obligations. Also, Progeny does not describe the nature or frequency of their communications with any vendors, manufacturers, end users or other entities in its due diligence. Without disclosing more information, there is no way to know what communication took place, if any, and whether or not it entailed anything more than calling a general number and speaking with an operator or hanging up.

Progeny never approached or called Havens about equipment for M-LMS, even though Havens had stated publicly that he was working on development of multilateration equipment for LMS. Havens asked Progeny, and FCR, if they wanted to cooperate in such a development, but neither chose to do so.

Manufacturers are not going to just make equipment on their own for the LMS service without a licensee making a business and technical case. Progeny's due diligence and its Response contained no business or technical plans that had been provided to vendors. These would have been critical elements of any real due diligence to obtain M-LMS equipment. This fact makes the survey disingenuous because no equipment manufacturer is going to suddenly just happen to make

equipment for the band, especially given the claims by Progeny in its rulemaking that multilateration has been obviated.

Progeny says manufacturers are reluctant to develop equipment for M-LMS, but then fails to show how it will convince these reluctant manufacturers to make multilateration equipment that it will supposedly provide to end users, including for alleged homeland security purposes.

Despite the Response assertions, Progeny provides no evidence of any agreements or communications with any critical infrastructure entities showing their interest in using the Progeny spectrum or, more importantly, stating what equipment is proposed to be used. There is no point in discussing with an end user use of the spectrum if Progeny is not proposing to them the equipment to be used or plans to develop any equipment.

Response failed to refute the Opposition in that Progeny did not pay or give any consideration to any company to develop equipment. The Response ~~Reply~~ is ~~not~~ mute on this point and provides no evidence to show otherwise, such as a contract or invoice.

Response relies on Havens and FCR precedents, but Havens has already shown why the Havens Order does not apply to Progeny and why the FCR grant was in error. Also, the FCR grant is under reconsideration.

Response ~~Reply~~ failed to provide any signed agreements or refer to any actual signed agreements or understandings to develop equipment.

Contrary to the Response at page 11, Progeny has failed to prove or show details of its “numerous efforts to develop markets, technology and applications,

including a comprehensive survey and period reviews of relevant vendors”. In fact, Progeny’s due diligence completely fails to support this claim because it contains no evidence and is based solely upon Progeny’s own assertions. The Progeny due diligence is devoid of any material evidence, including any contracts, agreements, communications, letters, offers, etc. Thus, the Commission cannot conclude anything from it.

The Response had an opportunity to submit actual proof of real due diligence but did not; therefore, it must be assumed that Progeny does not have any documentation other than its own assertions. At most the due diligence witnesses that Progeny made some phone calls and looked at some websites, but these could have been done in a day or two at any point in time.

Respectfully submitted,

*[Submitted Electronically. Signature on File]*

Warren C. Havens, Individually and as President of  
Intelligent Transportation & Monitoring Wireless LLC  
AMTS Consortium LLC  
Telesaurus VPC LLC  
Telesaurus Holdings GB LLC  
2649 Benvenue Ave., # 2 and 3  
Berkeley, CA 94704  
Ph: 510-841-2220  
Fx: 510-841-2226

December 13, 2005

## Exhibit 1

The below “McCart and Hilltop Orders” section is cut from the “Request Under Section 1.41 To Place on Public Notice or Alternative Action” (see pgs. 11-12) filed by Warren Havens via email on 5/2/05 with the Commission’s Secretary at [wtbsecretary@fcc.gov](mailto:wtbsecretary@fcc.gov) (Cc: to Thomas Derenge with the FCC and Progeny counsel), regarding File No. 0002049041 et seq. 19 pages. This “Request” was fully incorporated in Opponents’ Opposition at page 5 and Attacment 2, #2.

### McCart and Hilltop Orders

The Progeny Extension request should not be granted based on applicable precedents, in

addition to the fact, noted herein, that grant would be futile. As noted in footnote 4 above, Petitioners are not, in this Request, submitting a petition to deny, except as the last alternative request, and thus are not here presenting applicable precedents after the addition research they note above they would undertake for such purpose. However, the following is presented. The McCart Order<sup>9</sup> and Hilltop Order<sup>10</sup> (the .Orders.) apply.

The Commission found in McCart at par. 6:

McCart argues principally that it could not meet its construction deadline set forth in Section 90.665(c) because of the lack of digital technology for deployment in 900 MHz systems. However, we find this reason alone, and McCart.s economic arguments, for that matter,

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<sup>9</sup> In the Matter of Request for Extension of Time to Construct a 900 MHz Specialized Mobile Radio Station and Request for Waiver of the Automatic License Cancellation of Call Sign KNNY348, Order, 19 FCC Rcd 2209 (WTB, MD 2004) (McCart Order).

<sup>10</sup> In the Matter of Request for Extension of Time to Construct an Industrial/Business Radio Service Trunked Station Call Sign WPNZ964, Memorandum Opinion and Order, 18 FCC Rcd 22055 (WTB, CWD 2003) (Hilltop Order).

are insufficient to allow McCart to hold the spectrum until equipment finally becomes available. Significantly, McCart.s request is completely open-ended and provides no information as to how long it may take for equipment to become available for its particular system. Without some idea of when equipment will become available, we cannot even be sure that grant of a limited waiver in this case will provide relief to McCart.

The Commission found in Hilltop at par. 8:

Hilltop argues that it could not comply with the Section 90.155(a) because no mobile equipment was available that complied with a condition placed on this license. We find this reason alone, however, is insufficient to allow Hilltop to hold the spectrum until equipment finally becomes available. Significantly, Hilltop provides no information as to how long it may take for equipment to become available. Without some idea of when equipment will become available, we cannot even be sure that grant of a limited waiver in this case will provide relief to Hilltop. Finally, we disagree with Hilltop.s assertion that it is similarly situated to FCI 900, Inc. and Neoworld. FCI 900 Inc. and Neoworld were granted relief in order to allow time for digital equipment to become available. Unlike Hilltop.s situation, FCI 900, Inc. provided assurances from an equipment manufacturer that digital equipment would be available shortly, even though only analog (but not digital) equipment was available at that time. In contrast, Hilltop provides no plan for obtaining equipment and no certainty of when, if ever, equipment will be available to meet their needs.

Similarly, Progeny.s Extension Request is completely open-ended and provides no evidence that it is or will be pursuing any equipment development to satisfy the applicable construction rule, Section 90.155(d) and (e). Rather, as noted herein, Progeny asserts that the required Multilateration is obviated and the like, and will fail in the marketplace, and thus it seek other unidentified equipment and service. The Extension Request fails under these reasonable precedents, as well as the general waiver standard in Section 1.925.



Declaration

I, Warren C. Havens, hereby declare under penalty of perjury that the foregoing *Reply* including all Attachments and referenced incorporated documents were prepared pursuant to my direction and control and that all the factual statements and representations contained herein attributed to my knowledge, as the text or context makes clear, are true and correct.

*[Submitted Electronically. Signature on File.]*

---

Warren C. Havens

Date: 13 December 2005

Certificate of Service

I, Warren Havens, hereby certify that I have, on this day, December 13, 2005, placed into the USPS mail system, unless otherwise noted, a copy of the foregoing *Reply to Response to Opposition to Progeny Extension Waiver Request*, with First-class postage prepaid affixed, to the following:

Office of the Secretary  
Federal Communications Commission  
445 12<sup>th</sup> St., SW, Room TW-B204  
Washington, D.C. 20554

(Via email only to [WTBSecretary@fcc.gov](mailto:WTBSecretary@fcc.gov) pursuant to Order, FCC 01-345)

Richard Arsenault  
Wireless Telecommunications Bureau  
445 12<sup>th</sup> St., SW, Room 4-B408  
Washington, D.C. 20554

(Via email only to [Richard.Arsenault@fcc.gov](mailto:Richard.Arsenault@fcc.gov) )

Progeny LMS, LLC  
Janice Obuchowski  
Halprin Temple  
1317 F Street NW  
Washington, DC 20004

(Also via email to [JO@ftidc.com](mailto:JO@ftidc.com))

*[\[Filed electronically. Signature on file.\]](#)*

---

Warren Havens

The above is in accord with the settlement agreement regarding Opponents' FOIA request in this matter, which provides:

Filing of the comment cycle pleadings would be by e-mail under the procedures

- ☐ set forth in FCC 01-345\* (e-mail to [wtbsecretary@fcc.gov](mailto:wtbsecretary@fcc.gov) ) with a cc copy to
- ☐ Mr. Richard Arsenault at [Richard.Arsenault@fcc.gov](mailto:Richard.Arsenault@fcc.gov) and to the other party
- ☐ (as noted below). Parties would serve each other on the date of the filing by providing
- ☐ a copy by US mail or private courier. The Certificates of Service would reflect the
- ☐ process described above. E-mailed copies to Progeny would be sent to Ms. Janice
- ☐ Obuchowski at [JO@ftidc.com](mailto:JO@ftidc.com) , and e-mail copies to Mr. Havens would be sent to
- ☐ Counsel to Mr. Havens, Ari Fitzgerald, at [AQFitzgerald@hhlaw.com](mailto:AQFitzgerald@hhlaw.com) , with copies to
- ☐ Mr. Havens at [wchavens@aol.com](mailto:wchavens@aol.com) and [jstobaugh@telesaurus.com](mailto:jstobaugh@telesaurus.com) . In addition,

- ☐ on the same day as they are transmitted to the recipient, an electronic copy of the
- ☐ Progeny withdrawal request and Wireless Bureau acceptance, as noted above, would
- ☐ be transmitted by e-mail to Mr. Havens at the three e-mail addresses provided above.

**Before the  
Federal Communications Commission  
Washington, D.C. 20554**

In the Matter of	)	
	)	
Progeny LMS, LLC	)	File No. 0002049041 et seq. <sup>1</sup>
Waiver Requests for Extension of the	)	
M-LMS Five-year Construction	)	
Requirement		

To: Office of the Secretary  
Attn: Chief, Wireless Telecommunications Bureau

Opposition  
*Erratum Version\*\**

Warren Havens (“Havens”), Telesaurus Holdings GB, LLC (“THL”), Telesaurus-VPC, LLC (“TVL”), AMTS Consortium LLC (“ACL”), and Intelligent Transportation & Monitoring Wireless LLC (“ITL”)s (together the “Opponents”)<sup>2</sup> jointly and severally submit this opposition (the “Opposition”) to the above-captioned waiver request applications of Progeny LMS, LLC (“Progeny”) to extend the five-year construction requirement deadline (the “Construction Requirement” and the “Deadline”) of all of Progeny’s Multilateration Location and Monitoring Service (“M-LMS”) licenses (the “Progeny Licenses”) (the “Extension Request”). This is submitted pursuant to the settlement agreement regarding FOIA Control No. 2005-449 (an FOIA request submitted by Havens) among Progeny, Havens (for

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<sup>1</sup> This is the first file number of these applications, filed 2-15-05, as listed on ULS.

<sup>\*\*</sup> *Additions boxed; deletions in strikethrough; text aligned; page numbers added.*

himself and the above noted LLC entities he controls) and the FCC Wireless Telecommunications Bureau (the “Bureau”) via email exchange reached on or about November 14, 2005 (the “Settlement”).

### Summary

Progeny simply chose to abandon in full the requirements of M-LMS after it bought the Licenses under such requirements. Further, for the majority of its Licenses term to date, and to this day, it actively and publicly characterized M-LMS and these requirements as a failure. It sought and still seeks exclusive-spectrum CMRS-like “flexibility” in a shared-use band where structured uses are essential, and are already appropriately structured in existing M-LMS and related Part 15 rules. That is the goal of the Extension Request, not to provide M-LMS service under current rules. When the Commission did not buy into that, Progeny asked for this Extension Request suggesting it was diligently attempting to meet the very requirements [it] asserted were failures and it continued to seek to change. Understandably, its due-diligence materials submitted in support of the Extension Request are devoid of any effort to obtain or even express to outside parties the required M-LMS multilateration equipment: the only equipment that can satisfy the Construction Requirement.

There is no more clear case for not granting an extension request. It far exceeds in lack of any basis for grant the many extension requests rejected by the Commission in published precedents, some of which are discussed below.

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<sup>2</sup> Havens is the majority interest holder and President of THL, TVL, ACL, and

The Commission should maintain the spectrum in the Progeny Licenses for M-LMS, reclaim the spectrum, and auction it again.

### Background, Standing and Interest

The Settlement provided the right for submitting this Opposition and for its consideration by the Bureau. The FOIA request and related Settlement involved Havens, THL, TVL, and ACL. They thus have standing. In addition, Havens also controls ITL. ITL has interest and standing for the reasons next explained below, and such reasons further demonstrate standing for Havens, THL, TVL, and ACL.

Each of the Opponents hold FCC wireless authorizations<sup>3</sup> in large parts of the nation in Progeny Licenses' geographic markets. Progeny's M-LMS Licenses may be used to compete with some services authorized by all of Opponents' M-LMS, AMTST, 220 MHz, MAS and VPC licenses, since all of these classes of service allow two-way voice and data, and require (M-LMS) or allow multilateration-based location service. Their joint business plan is entirely consistent with the purpose the Commission established after extensive rulemaking and consideration for M-LMS.<sup>4</sup> Progeny has sought and to this day maintains an aggressive attempt to

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ITL.

<sup>3</sup> Havens holds M-LMS, VPC, and 220 MHz licenses. THL and TVL hold M-LMS licenses and VPC licenses. ACL and TVL hold AMTS licenses from Auction 57. Grant of ITL's MAS licenses from Auction 59 has been approved, but the licenses not yet awarded due to ITL seeking tribal land bidding credits, pursuant to which the time to obtain and present tribal certificates has not yet run. Grant of ITL's and ACL's long forms for licenses from Auction 61 has not yet been approved, is expected.

<sup>4</sup> Petitioners goals for all of the licensed spectrum they hold involves regional systems, eventually joined nationwide, using standards-based advanced location

change M-LMS rules which would change the purpose and use of M-LMS spectrum in the nation. This change would undermine the character and purpose of M-LMS: regardless of whether or not this change would require Havens and THL to change their pursuit of ~~this~~ their goals<sup>s</sup> note above, it would clearly allow Progeny the “flexibility” to pursue services and use technology not current allowed and abandon M-LMS as the Commission intended and as required under current rules. This would cause a drastic and highly damaging split in M-LMS as a service, with Havens and THL pursuing M-LMS as intended, for advanced wide-area vehicle-based location, monitoring, and associated communication services (mainly for mission-critical entities in public safety and service) and Progeny pursuing whatever “flexible” opportunities it wanted, which is most likely to be a sale of its spectrum to a company pursuing more commercial service if Progeny or such buyer obtains rule changes. This split would seriously damages M-LMS as a service.

M-LMS is unique not only for its special focus on, and limitation to, private vehicle- based wide-area location and communication service, but for it being in a band, 902-928 MHz, with a hierarchy of licensed and unlicensed uses. M-LMS is secondary to Federal rights, and ~~NTIA~~ NTIA has not given any of these up. (Opponents plan noted above includes expanded and improved use of the band by

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and wideband communication technologies, for use by public safety (including Intelligent Transportation System), critical infrastructure, and major enterprise entities on the basis of shared virtual private networks in public-private-nonprofit partnerships. These goals and plans have been presented in papers and meetings to staff at the FCC, NTIA, US Coast Guard, US Department of Homeland Security, US Department of Interior, APCO, and the major telecom trade organizations for

Federal entities.) There are substantial uses of 902-928 MHz by Part 15 systems, some at considerable power (the maximum allowed for some devices and modulation under applicable Part 15 rules and under the Safe Harbor in Part 90 LMS rules is 1 watt/ 6 dBi—higher than used by most all 3G and other advanced wireless enduser devices) and M-LMS must remain focused on wide-area service to vehicles, since that affords a spatial separation with Part 15 devices used, as they are, in local private areas or in high-traffic public areas<sup>5</sup>. M-LMS at its licensed higher power is ideal for very wide area links to vehicles (which also can use high power when needed, and gain antennas), and the same spectrum can be used by Part 15 systems in more localized areas that where, with few exceptions, will not be close to vehicles when the vehicle radios are used. This was thought out and articulated by the Commission, in heated debate with Part 15 and LMS licensed interests, in coming up with the current M-LMS (and nonmultilateration) rules.

Contrary to Progeny in RM-10403, M-LMS-M, including its required multilateration, is not an obviated service, nor is M-LMS as intended (as summarized above) incompatible with Part 15 uses or vice versa. The FCC Spectrum Task Force report (fall, 2002) was entirely correct that one form of advanced spectrum-efficient wireless will involve coordination in the subject band of higher power and lower power uses.

See also the Opponents Past Filings described next below: these describe in further detail the matters summarized above in this Section.

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US utilities, railroads, and other critical infrastructure. M-LMS is central to these



For the above reasons, the Opponents have a strong interest in and standing in this matter, and Progeny should not be permitted to extend its attempt, by grant of the Extension Request, to radically and harmfully change the M-LMS service.

#### Opponents' Past Filings Incorporated Herein

See the Attachment hereto that lists previously submitted filings to the Bureau in the matter of the Extension Request and RM-10403 (the "Opponents' Past Filings"). These present Opponents reasons for denial of the Extension Request, which Opponents incorporate in full in this Opposition. The Opponents' Past Filings have sections ~~on~~ further discussing background matters, summarily discussed above, and the need for due diligence and applicable precedents, summarily discussed below.

#### Progeny Due Diligence Filings Provided under the FOIA Request

Contrary to suggestions in the Extension Request, the documents Progeny submitted to the FCC (exclusive of the materials that Progeny withdrew and the Bureau accepted as withdrawn)<sup>5</sup> do not evidence any due diligence of any kind to search for, develop, acquire, or even conceive of M-LMS multilateration equipment needed to meet the Construction Requirement.

Also, these materials do not provide evidence of any substantial communication or investigation to obtain any equipment, or of any substantial

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goals and plans.

<sup>5</sup> Email from R. Arsenault to Havens 11-29-05, copied to counsel for Progeny.

expenditure or contractual commitments, or of any confidential arrangements, even nondisclosure agreements.

### Applicable Precedents

FCC case law establishes that the Extension Request cannot be granted. The following are some relevant precedents. Others are provided in the Opponents' Past Filings. Measured by these precedents, the Extension Request clearly fails for reasons summarized above and further discussed in the Opponents Past Filings. (Cases cited first below in brief are fully cited later below.)

Licensees who do not order equipment sufficiently in advance of the deadline do not demonstrate due diligence. In re Redwood Wireless at para 8; In re Eldorado at para. 8.

Where the equipment does not yet exist -- or is unavailable in sufficient quantities -- but will be available shortly, the FCC may grant a waiver. In re FCI 900, Inc at para. 7.

However, merely speculative assertions are not sufficient. The licensee should demonstrate that alternative equipment has been sought. In re Motient at para. 12. See also FN43 and associated text -- the FCC is most likely to grant extension where the licensee is attempting to offer advanced services.

Licensee's argument as to unavailability of equipment is speculative; no waiver granted: when equipment supplier ceased production of relevant equipment,

licensee did not seek other sources of equipment. In re Motient, 19 FCC Rcd 13086 (2004);<sup>6</sup>

Extension request denied for Licensee who waited too long to start equipment search: In re Redwood Wireless, 17 FCC Rcd 22416 (2002);<sup>7</sup> Also, In re Eldorado Communications, Inc., 17 FCC Rcd. 24613 (2002).<sup>8</sup>

Waiver granted where relevant equipment (900 MHz SMR digital voice equipment) unavailable in sufficient quantities to meet deadline, but it will be available "soon." Also, this was an industry-wide problem; many parties affected. In re FCI 900, Inc., 16 FCC Rcd. 11072 (2001).<sup>9</sup> Also, waiver granted due to lack of viable new equipment, but after extensive attempts at using old equipment, and in part because many licensees were requesting.<sup>10</sup>

For the above reasons, the Extension Request should be denied.

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<sup>6</sup> IN THE MATTER OF MOTIENT COMMUNICATIONS INC., Request for a Waiver and Extension of the 800 MHz Construction Requirements, DA 04-2124, Released: July 14, 2004.

<sup>7</sup> IN THE MATTER OF REDWOOD WIRELESS MINNESOTA, L.L.C. AND REDWOOD WIRELESS WISCONSIN, L.L.C., Order, DA 02-3040, Released: November 7, 2002, 17 FCC Rcd. 22,416.

<sup>8</sup> IN THE MATTER OF ELDORADO COMMUNICATIONS, L.L.C., Request for a Waiver and Extension of the Broadband PCS Construction Requirements, Order, DA 02-3370, Rel. December 5, 2002.

<sup>9</sup> IN THE MATTER OF FCI 900, INC. EXPEDITED REQUEST FOR 3-YEAR EXTENSION OF 900 MHZ BAND CONSTRUCTION REQUIREMENTS AND NEOWORLD . . . MO&O, DA 01-1297, Released May 25, 2001. 16 FCC Rcd. 11,072.

<sup>10</sup> In the Matter of Request of Warren C. Havens for Waiver or Extension of The Five-Year Construction Requirement For 220 MHz Service Phase II Economic Area and Regional Licensees . . . , MO&O, DA 04-2100, Rel. July 13, 2004

Respectfully submitted,

[\[Submitted Electronically. Signature on File\]](#)

Warren C. Havens, Individually and as President of  
Intelligent Transportation & Monitoring Wireless LLC  
AMTS Consortium LLC  
Telesaurus VPC LLC  
Telesaurus Holdings GB LLC  
2649 Benvenue Ave., # 2 and 3  
Berkeley, CA 94704  
Ph: 510-841-2220  
Fx: 510-841-2226

November 29, 2005

Declaration

I, Warren C. Havens, hereby declare under penalty of perjury that the foregoing *Opposition* including all the Attachments and referenced incorporated documents were prepared pursuant to my direction and control and that all the factual statements and representations contained herein attributed to my knowledge, as the text or context makes clear, are true and correct.

[Submitted Electronically. Signature on File.]

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Warren C. Havens

Date: 29 November 2005

## Attachment

### List of “Opponents’ Past Filings” (defined in text above)

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The below ~~six~~ seven documents are incorporated in full in this Opposition.

The first ~~three~~ four are most directly relevant to Opponents opposition of the Progeny Extension Request. The last three are relevant directly to the Progeny rulemaking request in RM-10403, but are also essential to Opponent’s position with respect to the Extension Request, including since the Extension Request must be viewed in light of Progeny’s position in its rulemaking request which Progeny has maintained all throughout the Extension Request proceeding.

- |  |
|--|
| 1) “Informal Reply to Opposition to Request for Public Notice or Alternative Action” filed by Warren Havens via email to <a href="mailto:wtbsecretary@fcc.gov">wtbsecretary@fcc.gov</a> on 6/14/05, regarding File No. 0002049041 et al. |
|--|
- 2) Email with subject “Request under Sec. 1.41: (1) Clarification, (2) Progeny ex parte filings” filed by Warren Havens on 5/15/05 with the Commission’s Secretary at [wtbsecretary@fcc.gov](mailto:wtbsecretary@fcc.gov) (Cc: to Thomas Derenge with the FCC and Progeny counsel), regarding File No. 0002049041. Also filed in RM-10403 via ECFS on 5/16/05. 3 pages.
  - 3) “Request Under Section 1.41 To Place on Public Notice or Alternative Action” filed by Warren Havens via email on 5/2/05 with the Commission’s Secretary at [wtbsecretary@fcc.gov](mailto:wtbsecretary@fcc.gov) (Cc: to Thomas Derenge with the FCC and Progeny counsel), regarding File No. 0002049041 et seq. 19 pages.
  - 4) Email with subject “Re: FCC extension request [of Progeny LMS LLC]” filed by Warren Havens in RM-10403 via ECFS on 3/30/05. Also sent via email on 3/30/05 to Progeny counsel and cced to Thomas Derenge with the FCC. 4 pages.
  - - - - -
  - 5) Email with subject “New filings, LMS extension, and RM-10403” filed by Warren Havens on 10/25/04 to Thomas Derenge with the FCC (Cc to Peter Tenhula and Richard Arsenault with the FCC). Also filed in RM-10403 on 10/25/04 via ECFS. 2 pages.
  - 6) Email with subject “RM-10403/Havens-Telesaurus” filed by Warren Havens on 8/24/03 to Bryan Tramont with the FCC. Also filed in RM-10403 on 8/25/03 via ECFS. 2 pages.
  - 7) Letter with Subject “RM-10403 (902-928 MHz)” filed by Warren Havens in RM-10403 via ECFS on 8/11/03, and addressed to “FCC: David Furth,

Kathleen Ham, Richard Arsenault, Paul D'Ari, Julie Knapp" (also sent via email to the FCC-email for each staff person).

Certificate of Service

I, Warren Havens, hereby certify that I have, on this day, November 29, 2005, placed into the USPS mail system, unless otherwise noted, a copy of the foregoing *Opposition* to Progeny Extension Waiver Request, with First-class postage prepaid affixed, to the following:

Office of the Secretary  
Federal Communications Commission  
445 12<sup>th</sup> St., SW, Room TW-B204  
Washington, D.C. 20554

(Via email only to [WTBSecretary@fcc.gov](mailto:WTBSecretary@fcc.gov) pursuant to Order, FCC 01-345)

Richard Arsenault  
Wireless Telecommunications Bureau  
445 12<sup>th</sup> St., SW, Room 4-B408  
Washington, D.C. 20554

(Via email only to [Richard.Arsenault@fcc.gov](mailto:Richard.Arsenault@fcc.gov) )

Progeny LMS, LLC  
Janice Obuchowski  
Halprin Temple  
1317 F Street NW  
Washington, DC 20004

(Also via email to [JO@ftidc.com](mailto:JO@ftidc.com))

*[\[Filed electronically. Signature on file.\]](#)*

---

Warren Havens

The above is in accord with the settlement agreement regarding Opponents' FOIA request in this matter, which provides:

Filing of the comment cycle pleadings would be by e-mail under the procedures

- ☐ set forth in FCC 01-345\* (e-mail to [wtbsecretary@fcc.gov](mailto:wtbsecretary@fcc.gov) ) with a cc copy to
- ☐ Mr. Richard Arsenault at [Richard.Arsenault@fcc.gov](mailto:Richard.Arsenault@fcc.gov) and to the other party
- ☐ (as noted below). Parties would serve each other on the date of the filing by providing

☐ a copy by US mail or private courier. The Certificates of Service would reflect the

☐ process described above. E-mailed copies to Progeny would be sent to Ms. Janice

☐ Obuchowski at [JO@ftidc.com](mailto:JO@ftidc.com) , and e-mail copies to Mr. Havens would be sent to

☐ Counsel to Mr. Havens, Ari Fitzgerald, at [AQFitzgerald@hhlaw.com](mailto:AQFitzgerald@hhlaw.com) , with copies to

☐ Mr. Havens at [wchavens@aol.com](mailto:wchavens@aol.com) and [jstobaugh@telesaurus.com](mailto:jstobaugh@telesaurus.com) . In addition,



- ☐ on the same day as they are transmitted to the recipient, an electronic copy of the
- ☐ Progeny withdrawal request and Wireless Bureau acceptance, as noted above, would
- ☐ be transmitted by e-mail to Mr. Havens at the three e-mail addresses provided above.